Fuller

167-419

CERTIFICATE.

May 22. 1897

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED MARCH 9, 1897.

(16,512.)

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INDEX.

	Original.	Print.
Judge's certificate	1	1
Statement of facts	1	1
Order of commission, May 29, 1894	3	3
Question certified	10	9
Exhibit A—Opinion of Judge Sage	12	10
Clerk's certificate	17	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 9, 1897.

1 In the United States Circuit Court of Appeals for the Sixth Circuit, Sitting at Cincinnati, Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY *et al.* } No. 472.

This cause came before this court on an appeal from the decree of the United States circuit court for the southern district of Ohio, western division. The transcript of the record being presented to the court, it appears that on the 26th day of December, 1891, the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau, both mercantile societies within the meaning of the act to regulate commerce as amended, duly and separately complained to the Interstate Commerce Commission, in accordance with the provisions of said act, of certain things done and omitted to be done by the defendants in this cause, common carriers subject to the provisions of said act, to wit:

That said common carriers so subject to the provisions of said act did, in contravention thereof, make, for services rendered and to be rendered in the transportation of property between
2 various places in different States named in said complaints, unjust and unreasonable charges, and did make in such service unjust and unreasonable exactions upon interstate traffic represented by the said two complainants respectively and therein designated and set forth, and did omit and refuse to carry such freight for reasonable and just compensation under the circumstances set forth in said complaints respectively; all of which matters were duly set forth in said complaints, and especially with reference to the transportation of freights from Cincinnati and Chicago respectively to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Birmingham, Ala.; Anniston, Ala.; Selma, Ala., and Meridian, Miss., and territory contiguous thereto, and praying, among other things, that said defendants might be required to answer the charges in said complaints, and that after due hearing and investigation the said defendants, interstate common carriers as aforesaid, be commanded to desist from said alleged violations of said act to regulate commerce, and for such other and further order as the said Interstate Commerce Commission might deem necessary and just in the premises, and also praying that the said defendants might be required to so adjust their several freight tariffs in the respects so set forth as should effect the relief sought for by the said complaints.

It further appears that said defendants were duly notified by the commission of the said complaints, and that they duly ap-
3 peared before the said commission and answered the said complaints, denying the truth and justice thereof, and that thereupon and thereafter such proceedings were had by and before said commission, upon evidence taken, that after full hearing and

investigation by the said commission the said commission, on the 29th day of May, 1894, decided the said matter, and in due and regular course made its report and opinion in writing upon the subject, stating that it found and declared the charges and exactions complained of were unreasonable and unjust and should reasonably and justly be reduced to sums named in the order of the commission herein stated and set forth; which report and opinion included the findings of fact upon which the conclusions of the commission were based, all in due conformity with the law so far as procedure is concerned.

It further appears that thereupon, on the same day, the said commission, in due and regular course of procedure, made an order founded on and pursuant to said report, findings, and opinion in the words and figures following, to wit:

"At a general session of the Interstate Commerce Commission held at its office, in Washington, D. C., on the 29th day of May, A. D. 1894.

Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements, and Hon. James D. Yeomans, commissioners.

THE FREIGHT BUREAU OF THE CINCINNATI CHAMBER OF COMMERCE

v.

4 THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western & Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Railroad and Banking Company of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington, Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

THE CHICAGO FREIGHT BUREAU

v.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY; The Chicago and Alton Railroad Company; The Chicago and Eastern Illinois Railroad Company; The Cincinnati, Hamilton and Dayton Railroad Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The

Evansville and Terre Haute Railroad Company; The Illinois Central Railroad Company; The Louisville, Evansville and St. Louis Consolidated Railroad Company; The Peoria, Decatur and Evansville Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Terre Haute and Indianapolis Railroad Company; The Wabash Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company, Lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western and Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Railroad and Banking Company of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington, Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved herein having been had, and the commission having on the date hereof made and filed a report and opinion containing its finding of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the commission having, as appears by said report and opinion, found and decided, among other things, that the rates complained of and set forth in said report and opinion as in force over roads operated by carriers defendant herein and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Meridian, Miss.; Birmingham, Ala.; Anniston, Ala., and Selma, Ala., are unreasonable and unjust and in violation of the provisions of the act to regulate commerce:

It is ordered and adjudged that the above-named defendants and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth, or sixth class, do from and after the 10th day of July,
7 1894, wholly cease and desist and thenceforth abstain from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to Knoxville,

Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Meridian, Miss.; Birmingham, Ala.; Anniston, Ala., or Selma, Ala., than is below specified in cents per hundred pounds under said numbered classes respectively and set opposite to said points of destination—that is to say:

On shipments of freight from Cincinnati—

To—	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville.....	53	45	37	27	22	20
Chattanooga....	60	54	40	30	24	22
Rome.....	75	64	54	44	34	24
Atlanta.....	86	73	60	45	35	27
Meridian.....	114	98	80	62	49	38
Birmingham....	87	74	60	46	36	28
Anniston.....	86	73	60	45	35	27
Selma.....	108	92	78	60	48	36

8 On shipments of freight from Chicago—

To—	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville	93	79	62	44	37	32
Chattanooga....	100	88	65	47	39	34
Rome.....	114	97	79	61	49	38
Atlanta.....	126	107	85	62	50	39
Meridian.....	114	98	82	60	47	38
Birmingham....	111	95	72	52	44	34
Anniston.....	126	107	85	62	50	39
Selma.....	128	112	89	66	53	38

And said defendants and each of them are also hereby notified and required to further readjust their tariffs of rates and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

And it is further ordered that a notice embodying this order be sent to each of the defendant corporations, together copy of the report and opinion of the commission , in conformity with the provisions of the fifteenth on of the act to regulate commerce."

Which said order and notice were duly served upon the said defendants, together with said report, findings, and opinion in the proceeding, and a copy of the same was, pursuant to law, communicated to the complainants in said matter.

It further appears that in said cases in which the aforesaid proceedings were had that it was alleged to have appeared to the satisfaction of said commission, upon consideration of the allegations of all parties concerned and of the testimony and evidence duly taken before said commission, that the said defendants, in violation of the provisions of said act, had charged and collected from the persons represented by the said complainants respectively, for the services described in said complaints and proceedings, in the interstate transportation therein specially described, and were continuing so to charge and exact payments therefor, which were unjust and unreasonable to the extent of the excess of the charges, collections, and exactions of said carriers above and beyond the charges set out and stated in said order and alleged to have been found and held by the commission to be just and reasonable.

It further appears that said order of said commission hereinbefore stated was duly served upon said defendants respectively, together with a copy of said report, findings, and opinion, within the time specified in said order and notice.

10 It further appears that said common carriers, defendants as aforesaid, neglected and refused to obey and perform said order and the requirements of the commission or any part thereof, they insisting that the same were not lawful.

Thereupon said commission filed in the United States circuit court of the southern district of Ohio, western division, having jurisdiction in the premises, its petition against said defendants, setting forth the due course of proceeding hereinbefore stated and alleging that the said defendants had so refused to obey the said order of the commission; whereupon the said parties defendant appeared and made answer to said petition, denying the truth and justice thereof; whereupon evidence was taken and a hearing had in the said circuit court; whereupon, upon due hearing, the said circuit court made a decree dismissing the petition of the said commission for the reason stated in the opinion of said court, a copy of which is hereto attached and made a part hereof, marked Exhibit A.

That thereupon the said commission duly appealed to this court, and, the transcript of the record of the said matter in said circuit court being presented to this court and being brought on for hearing, it appears that the following question and proposition of law arises, concerning which this court desires the instruction of the Supreme Court of the United States as to its proper decision, namely, Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth—all proceedings preceding said order being due and regular, so far as procedure is concerned?

11 Whereupon this court, upon its own motion, orders that said question and proposition of law be stated by this court and

certified to the Supreme Court of the United States for its instruction thereon. Ordered that the foregoing statement of facts and of the question of law arising thereon so made under the direction of the judges of this court be, and the same is hereby, certified to the Supreme Court of the United States as a question and proposition of law concerning which this court desires the instruction of the said Supreme Court of the United States in respect of its proper decision.

WM. H. TAFT,
HORACE H. LURTON,
H. F. SEVERENS,
Judges Constituting the Court of Appeals in this Cause.

March 2, '97.

12 EXHIBIT A.

United States Circuit Court, Southern District of Ohio, Western Division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY *et al.*

The right of the Interstate Commerce Commission to prescribe maximum rates for the transportation of freight was assumed by the commission, is contended for by their counsel, and is essential to their case. It is the right to dictate an indispensable and one of the most important terms of the contract between the carrier and the shipper. As a legislative right, so long and so generally recognized as to be beyond question, it results from the corporate existence of the common carrier, or from his quasi-public relation to any and all who may come to him as freighters or passengers, and it is generally limited to fixing maximum rates, although, doubtless, it might be extended to include—what is probably as important—minimum rates. It can hardly be said to be within the recognized limits of the exercise of judicial right or power, because while a court of equity may enforce specific performance of a contract, or rescind it, or correct mutual mistakes in it, it never makes a contract. The Interstate Commerce Commission is not invested and cannot be invested under
13 the Constitution with either legislative power or purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such quasi-judicial powers as are incidental and necessary to the proper performance of those duties. This is a proposition which does not in the slightest depend upon the eminence, morally, socially, intellectually, or officially, of the individual members of *of* the commission, which was emphasized in the argument. The right claimed

is not an incidental right. It is not a right of power to be deprived by implication or by construction from general phrases in the first or other sections of the act, nor can it be imported into the act by reference to or by reason of the necessities of the case. If found at all, it must be found in express and specific language among the powers and rights granted in direct terms, and there is no such language in the act.

The power of the commission to fix rates was denied by the Supreme Court in The Cincinnati, New Orleans & Texas Pacific Railway Co. *vs.* The Interstate Commerce Commission, 162 U. S., 196, known as the Social Circle case. The Supreme Court there declared:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in courts below and is discussed in the briefs of counsel.

"We do not find any provision of the act that expressly or by necessary implication confers such a power.

"It was argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the commission is to consider these facts and give
14 — their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable."

Upon the expression in the first paragrap*g* quoted above, "the power to itself fix rates," and the expression "itself fixes a rate," in the last paragraph quoted, counsel for the commission contend that the Supreme Court had in mind the exercise by the commission of a power to fix or prescribe rates in advance of "issue made and a finding of the facts," or, in other words, as said by the Supreme Court in Texas & Pacific Railway Company *vs.* Interstate Commerce Commission, 162 U. S., 197, known as the "Import case," a power to do so "of its own motion and without a hearing of the parties to be affected."

What the Supreme Court upheld in the Import case was the order of the commission that the inland rate on certain foreign traffic should not be less than the rate on domestic traffic of the same kind, and as that was then 288 cents per hundred pounds, counsel claim that the order fixed the rate for the time being at 288 cents. They, however, ignore the distinction that there the order in effect only provided that — should be no discrimination in rates against foreign traffic, leaving the railway company at perfect liberty to change rates at pleasure, provided that if there should be a lowering of rates for the domestic freight, there should be a corresponding reduction as to the foreign freight, and *vice versa*, while here a fixed maximum rate was prescribed which could be
15 exceeded only upon subsequent order by the commission. The contention, based upon the use by the Supreme Court of

the phrase already quoted, is too narrow and technical. That no such limitation upon its opinion was intended is made perfectly plain by the concluding paragraphs, which are immediately after the paragraphs above quoted and are as follows:

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of the Interstate Commerce Commission *vs.* Baltimore & Ohio Railroad Co. (43 Fed. Rep., 37), and whose judgment was affirmed by this court (145 U. S., 263).

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

This construction of the law has been followed by Judge Clark in Interstate Commerce Commission *vs.* Louisville & Nashville R. R. Co., 73 Fed. Rep., 409; by Judge Acheson in Same *vs.* Lehigh Valley R. R. Co., pamphlet report; by Judge Simonton in Same *vs.*
Northeastern R. R. Co., 74 Fed. Rep., 70, and by Judge
16 Bruce in Same *vs.* Alabama Railway Co. *et al.*, 69 Fed. Rep., 227.

This court adopts the language of Judge Acheson in Interstate Commerce Commission *vs.* Lehigh Valley R. R. Co., cited above:

"These views of the Supreme Court decisively show that the Interstate Commerce Commission is not clothed with the power to fix rates, which it undertook to exercise in this case." The Social Circle case being decisive and controlling, it is not necessary, nor would it be profitable, to enter upon the discussion whether the rates fixed by the commission are reasonable.

The petition will be dismissed with costs.

GEO. R. SAGE,
U. S. District Judge.

October 8th, 1896.

17 UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate in the case of Cincinnati, New Orleans & Texas Pacific Railway Company *et al.* was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 8th day of March, 1897.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] No. 472. United States circuit court of appeals for the sixth circuit. The Interstate Commerce Commission *vs.* The Cincinnati, New Orleans and Texas Pacific Railway Company *et al.*

Endorsed on cover: Case No. 16,512. U. S. circuit court of appeals, 6th circuit. Term No., 733. The Interstate Commerce Commission, appellant, *vs.* The Cincinnati, New Orleans & Texas Pacific Railway Company *et al.* (Certificate.) Filed March 9th, 1897.

167-479

Office Supreme Court, U. S.
FILED.
MAR 12 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILROAD COMPANY et al.
} No. 733.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILROAD COMPANY et al.

No. 733.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION TO ADVANCE.

This case involves the question whether, under § 1 of the Interstate Commerce Act, the appellant has the power to fix a *maximum* rate.

It is a question of great importance, and much litigation is temporarily being stayed to await the decision of this court. It comes up here on certificate, unembarrassed by other issues.

It has been argued in the Florida Orange case, No. 141 of this term, which is still undecided; but in that case it was not raised by any assignment of error.

The similar question under § 3 of the act will be argued in the Alabama Midland case, No. 563 of this term; but it may be claimed that the power of this appellant under the two sections is not the same.

At request of the appellant, and upon consent of the appellee, the Solicitor General moves to advance this cause for early oral argument.

HOLMES CONRAD,
Solicitor General.

167-479

Office Supreme Court, U. S.
FILED.
MAR 22 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant,
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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY et al. } No. 733.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

This is a suit to enforce the order of the Interstate Commerce Commission in *Freight Bureau* v. *C., N. O. & T. P. Ry. Co. et al.*, 6 Int. C. C., 195. The following extracts from the order (pp. 3–4) are sufficient for the presentation of the question certified:

> * * * The Commission having * * * found and decided, among other things, that the rates complained of * * * from Chicago or Cincinnati to Knoxville, Tenn., [and other southern points named] are unreasonable and unjust and

in violation of the provisions of the act to regulate commerce:

It is ordered and adjudged that the above-named defendants * * * do, from and after the 10th day of July, 1894, wholly cease and desist and henceforth abstain from charging, demanding, collecting or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati in the State of Ohio, or from Chicago in the State of Illinois to Knoxville, Tenn. [and other southern points named] than is below specified. * * * On shipments of freight from Cincinnati to Knoxville, class 1, rates per 100 lbs., cents 53 [&c.] * * * On shipments of freight from Chicago to Knoxville, class 1, rates per 100 lbs., cents 93 [&c.]. * * *

And said defendants and each of them are also hereby notified and required to further readjust their tariffs of rates and charges, so that from and after the said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points—other than those hereinabove specified—shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

QUESTION CERTIFIED.

The question is as follows (p. 5):

Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth—all proceedings preceding said order being due and regular so far as procedure is concerned?

It appears from its recitals above quoted that this order is made under § 1 of the Interstate Commerce Act (act of February 4, 1887, c. 104).

It is inferable from the certificate that the record before the circuit court of appeals does not contain facts rendering it necessary to discuss the last paragraph above quoted from the order. The overcharges found to have been made are in "excess of the charges, collections, and exactions of said carriers above and beyond the charges *set out and stated in said order*" (p. 5).

The question presented is therefore a simple one: "Has the Interstate Commerce Commission, when it finds a rate to be unreasonable and in violation of § 1, the right to find the *maximum* reasonable rate, and direct that the charges of the railroad be reduced to that figure?" This is the same question which has been argued in the Florida orange case, No. 141 of this term (where it was not raised by the assignment of errors) and in the Alabama Midland case, No. 563 of this term (which, however, arose under § 3 and not under § 1 as here).

The question here directly presented has sometimes been stated in forms which might tend to mislead.

Making rates. The question is sometimes stated thus: "Has the Interstate Commerce Commission the power to *make* rates?" "Making" rates involves the idea of original action, assuming the powers of a board of railroad directors. The Commission, on the contrary, deals only with rates which have already been "made," but which are alleged to be unreasonable. It does not undertake to make a new rate, but simply to find how far, if at all, the rate already made is in excess of the highest figure which would in any view of the case be reasonable. It then directs the railroads to reduce their

charges at least in so far as they have been found unreasonable, leaving them to readjust as they think best within the limits thus found. It may be added that action under § 1 of the Interstate Commerce Act is very rare. The vice of railroad rates in this country, when vice exists, is commonly in improper discrimination. The case is decided by the Commission ordinarily under the third and fourth sections. Even when it bases its action upon the first section, an element of discrimination will be found at the bottom of the case. Thus in the Florida orange case the unreasonableness consisted in a sudden and very great advance in rates after the district had been settled and brought into cultivation under the influence of a long-continued system of comparatively low rates. In the present case the unreasonableness consisted in discrimination in favor of northeastern cities as against Chicago and Cincinnati, a discrimination intended for the purpose of giving the former the sole control of certain southern markets and to prevent competition.

Fixing rates. The question is sometimes stated thus: "Has the Interstate Commerce Commission power to *fix* rates?" "Fixing" rates involves an idea of permanence, notwithstanding changed conditions. Language is sometimes used in argument which involves this erroneous idea. The Interstate Commerce Commission acts with regard to present, not future, conditions. Conditions change, and sometimes rapidly. What is unreasonable now may become reasonable in future, or *vice versa*. Preferences may be undue now and due in future, or *vice versa*. The

long and short haul clause may be applicable now, where in the future a special case may arise calling upon the Commission to dispense with its operation. Orders of the Commission must, therefore, stand subject to be reopened as the environment changes. The Commission does not "fix" a rate, properly speaking, but strikes off the amount found to be unreasonable, by an order which remains in effect as long as the rate would continue to be unreasonable, and until changed conditions are brought to its attention.

In fact, a reasonable rate is not a fixed amount, but is any amount between the *maximum* that is fair to the shipper and the *minimum* that is fair to the carrier. (4 Int. C. C., at p. 578.)

ARGUMENT.

Under § *4* the Social Circle case, 162 U. S., 184, has already decided that the Commission may name a *maximum* rate. It may say: "You shall charge no more to Social Circle than to Augusta." If the situation at Augusta had been such as to constitute a "special case," within the proviso to this section, the order of the Commission might still have named the *maximum* rate. It might have read: "You shall charge not over x cents more to Social Circle than to Augusta;" or (the rate to Augusta being y cents) "Your charge to Social Circle shall be no greater than $x+y$."

Under § *3*, as argued in the Alabama Midland Case, the result must be the same. The Commission may say: "You shall charge no more to Troy than to Columbus;"

or "You shall charge not over x cents more to Troy than to Columbus;" or (the rate to Columbus being y cents) "Your charge to Troy shall be no greater than $x+y$."

Under § 1 there is no other locality with which a comparison can be made for the purpose of stating the rate. Consequently the comparison must be made with the *maximum* reasonable rate. Assuming that any rate from x down to y would be reasonable from Cincinnati to Knoxville, and that the railroad charges more than x, the Commission can settle the controversy only by saying: "You shall charge no more than x." If the Commission has not got the power to make such an order as this in a proceeding for the correction of an unreasonable rate, it must be because there is an express or implied restriction in the act, or because the act has failed to give the Commission general power over its own enforcement. The following points are submitted for the purpose of showing that the act is not defective:

I. *There is no express or implied restriction.*

If the Commission has not got this power, it must be because the legislators have failed to use sufficiently general language in their delegation to the Commission of the regulating powers inherent in Congress.

That it is a true legislative power and may be delegated (although limited by the restriction that it shall not be exercised to the extent of confiscation) is settled by *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 362.

II. *The powers of the Commission are as general as possible.*

Under § 12:

> The Commission is hereby authorized and required to execute and enforce the provisions of this act.

Other provisions of this and other sections show that the Commission's execution and enforcement are to be by the issuance of orders, which must be themselves made effective by the aid of the courts; but there is no language indicative of any restriction upon the Commission's order, so that it shall not dispose of the whole controversy like a decree in equity.

III. *If in deciding a rate unreasonable the Commission can not find the highest reasonable figure and order a reduction at least to that point, the act fails to attain one of its main objects.*

The first object of the interstate-commerce act was (145 U. S., at p. 276):

> To *secure* just and reasonable charges for transportation.

Merely declaring unreasonable rates to be illegal and making the excess recoverable by action from the railroad company would add nothing to the common law (154 U. S., at p. 397):

> Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate.

This common-law right of action is not practically a sufficient remedy to prevent the evil. Hence the United States, like Great Britain and like many or most of the States, has found a regulating Commission to be necessary.

If the Commission, finding that x is the highest rate that can be called reasonable in any view of the case, and that $x+y$ is charged, can not direct that the rate be reduced to x, it can afford no remedy superior to that of the common law. If it says simply "You shall not charge $x+y$," the railroad may charge $x+\frac{9}{10}\ y$ or $x+\frac{99}{100}\ y$, and the litigation may go on until the Commissioners are out of office, the conditions changed, and the railroad reorganized.

If, on the other hand, the Commission, having recited that x is the highest reasonable rate, says, "You shall charge no unreasonable rate," the effect is the same as that of the order now before the court.

The appellees' contention is contrary to the true interests of carrier and shipper alike, and of the public. The position formerly taken by the railroads, and the views of the Commissioners, are to be found in the Appendix hereto.

IV. *The special provisions of the act confirm these views.*

What is the course taken by the individual shipper when x is the *maximum* of reasonableness in a freight rate, and the railroad is charging $x+y$?

He may, under § 9—

> Either make complaint to the Commission as hereinafter provided for, or may bring suit * * *

> for the recovery of the damages for which such common carrier may be liable under the provisions of this act.

Those damages, under § 8, are—

> The full amount of damages sustained in consequence * * *

that is, *y* (together with costs and attorney's fee).

If he petition the Commission instead of bringing his own action, then the Commission calls upon the carrier, under § 13—

> To *satisfy* the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission.

The carrier is relieved from liability to the shipper for the particular act complained of, if it (§ 13)—

> Within the time specified shall *make reparation* for the injury alleged to have been done.

But the Commission must investigate (§ 13)—

> If such carrier shall not *satisfy* the complaint within the time specified, *or* there shall appear to be any reasonable ground for investigating said complaint.

The complaint can only be satisfied—reparation can only be made—after ascertaining what is the *maximum* reasonable rate.

The Commission, after its investigation, shall report in writing (§ 14)—

> The findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to *what reparation*, if any, should be made by the common carrier to any party or par-

> ties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

It must hence find the *maximum* reasonable rate, as well as the fact that the complainant has been injured; and its finding upon each point is sufficient to support a verdict upon a subsequent petition for damages, under the last paragraph of § 16.

This report is to be served upon the carrier, together with (§ 15)—

> A notice to said common carrier *to cease and desist from such violation*, or *to make reparation* for the injury so found to have been done, or *both*, within a reasonable time, to be specified by the Commission.

The carrier is relieved from damages only if it appear that within such time (§ 15)—

> Such common carrier has ceased from such violation of law, *and* has made reparation for the injury found to have been done.

To evidence these facts (§ 15)—

> A statement to that effect shall be entered of record by the Commission.

Clearly the Commission is bound to inquire whether the carrier has desisted from the *whole* overcharge, not from any fraction of it. Its order that the carrier desist is referred to in the opening clause of § 16, in the words:

> That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey *any lawful order* or requirement of the Commission.

How, then, can it be argued that an order directing the carrier for the future to make, neither in whole nor in part, the overcharge for which it is to make reparation, is not a *lawful order* or requirement?

When this order is found by the court to have been violated, its writ of injunction is § (16)—

> To restrain such common carrier from further continuing such violation or disobedience of such order or requirement of the Commission, *and enjoining obedience to the same.*

That is what the Commission seeks in the suit at bar.

V. *Practical construction.*

If the action of the Interstate Commerce Commission in executing its duties under the act is to have controlling weight when unquestioned for many years, as in the nature of a departmental construction, this is certainly a case for application of the rule. When the Commission failed in a single case to specify the *maximum* rate, its failure was complained of by the railroad company (see Appendix). So recently as at the time of the decision of the Florida orange case by the circuit court of appeals, able counsel for the railroad company did not question the power by an assignment of error. The recent decisions of circuit courts against the existence of this power are based upon a strained application of the word "prejudge" in the Social Circle case—a word used nine years after the act went into operation.

It is not intended here, however, to argue that a construction by the Interstate Commerce Commission has

the same effect as a departmental construction (even if a departmental construction for nine years would be sufficient to restrict the meaning of a law). The Commission is in so far a court that it respects the rule of *stare decisis* to an extent not recognized in an executive department. Thus in the interpretation of the long and short haul clause it has always felt obliged to respect and in main to follow the original decision, although conceded to contain error, until that decision shall be overruled by the courts. The fact, however, that the power to fix *maximum* rates has been so long unquestioned by an able bar, as well as by the Commission and courts, is entitled to great weight. Moreover, there is no ambiguity in the statute upon which the contrary construction can be based.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX.

[Extract from opinion of Morrison, C., in Coxe Brothers v. Lehigh Valley R. R. Co. (4 Int. C. C., at pp. 576–578). (Argued March 19, 1889. Decided March 13, 1891).]

* * * * *

These facts lead us to the conclusion that the rates in question are unreasonable.

After submitting the proposed findings of fact for the consideration of the Commission, counsel for complainant in his concluding argument said:

"As to the unreasonableness of the charge, we ask the Commission to find that the rate of $1.80 is unreasonable within the statute. We do not ask or care about your honor's establishing any particular rate." * * *

"There are a great many ways in which these coal rates can be determined without fixing any arbitrary or inflexible standard. It could be by a sliding scale depending upon the price of coal. You could determine first the cost of mining coal and then the cost of railroad transportation. * * * Another way to establish the rate would be at some fixed proportion of the average of the selling price of coal at tide water. * * * If they (the carriers) are informed that their present rate is unreasonable they will then meet the individual operators of their districts in consultation, and I am sure some amicable arrangement will be reached by which both parties can make money."

Complainants' counsel here expressed the belief that the coal traffic afforded a fair profit to both producer and carrier; that to secure an equitable division of the profits it was only necessary to declare the charge made to be

unreasonable and the parties would come together and fix the proper rate themselves.

Counsel for the road said in reply:

"That will not do. If this Commission says that the present rates are unreasonable, they must say so because there is a different rate they have determined to be a proper one. It will not do for you to make a general finding and to say: 'The present rates are unreasonable, but we do not know what they ought to be. We can not fix them for you. You must agree upon them amongst yourselves.' If unreasonable, say to what extent they are unreasonable; whether to the extent of a cent, or of many cents, or of a dollar, a ton. Would it be proper for you to lay down an abstract principle that would lead to endless confusion in the application? That would put all at chaos. For Heaven's sake do not ever make the matter of the proper rates for carrying coal one to be regulated in a conference between the carrier and the shipper. If you have been convinced by these petitioners that the present rates are unreasonable and unjust, then say what the rates ought to be. This will be your duty. I do not wonder that Mr. Gowen shrinks from asking you, with the imperfect materials he has presented and with the information he has failed to furnish, to say what these rates shall be."

Having declared the rates in question to be unreasonable, if we should act upon the suggestion of counsel for complainants and fix upon none which may be properly charged, the case before the Commission would be at an end when the railroad company was notified that its rates were found to be excessive and must be modified. The Commission having prescribed no measure of reduction, any modification made in good faith would be a compliance with the required modification, yet it might be unsatisfactory to complainants and other operators, and fall short of what the law requires. Then the occasion would be presented when the operators and carriers

might meet and amicably arrange what the charges should be, in accordance with the suggestion of complainants' counsel.

In such a meeting or conference of operators and carriers, where possible conflict of interest and opinion could arise, it might and most likely would occur that no satisfactory arrangement would be reached, and another application to the Commission would be necessary to declare the reduced rates still unreasonable. This process would need to be repeated until the legal rate was established by successive reductions, made in compliance with a series of determinations of the Commission that the rates were unreasonable.

In the case under consideration suppose the facts to be as claimed, that the charges are excessive, as much or more than 50 cents. Under the rule suggested by complainants' counsel, when the rate was ascertained to be unreasonable it would be so declared and left with the shipper and carrier for amicable arrangement. If for any reason no scale of charges was agreed upon the rate would remain for determination by the carrier whose rate is challenged. Under such a rule applied to the subject of this complaint five several proceedings would be necessary to establish the reasonable rate if in each proceeding the carrier deemed a 10-cent reduction sufficient. If, impressed with the belief that the existing rates were not exorbitant, the carrier should attempt compliance with the Commission's conclusion that they were excessive by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this, but, as insisted upon by counsel for the road, when we have been convinced that rates are unjust it will be our duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the

Commission in respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decided them to be, and for any reason the Commission may not determine what are, as well as what are not, reasonable, the regulation provided by the statute begins with complaint and ends in confusion.

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FILED.
MAR 22 1897
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, Appellant,
vs.
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.
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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE APPELLANT.

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STATEMENT.

It appears from the statement of facts in the certificate in this case that on May 29, 1894, the Interstate Commerce Commission in certain cases duly brought and prosecuted before it by the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau respectively against certain common carriers subject to its jurisdiction, duly issued and served upon the defendants a certain order in conformity with its report and findings of fact and conclusions based thereon made at the same time. (Rec. 1, 2.)

The Commission, among other things, found that certain rates of freight "in force over roads operated by said defendant carriers and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala., Anniston, Ala., and Selma, Ala., and contiguous territory," were being exacted and collected by the carriers from the persons represented by the complainants before them, which were unjust and unreasonable to the extent that they exceeded the rates found by the Commission to be just and reasonable; and that just and reasonable rates would not exceed certain rates therein specified. (Rec. 3, 5.)

The order commanded the defendants, from and after July 10, 1894, to "cease and desist from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight" in the classes named between the points designated than set out in the order, and "to further readjust their tariffs of rates and charges" to other points than those specified, so as to be in due and proper relation to the rates put into effect in compliance therewith. (Rec. 3, 4.)

The carriers refused to obey the order. (Rec. 5.)

The Circuit Court for the Southern District of Ohio dismissed the petition of the Commission which sought its enforcement upon the sole ground that the Com-

mission had no power to make an order prescribing rates. (Rec. 5, 6–8.)

The Commission appealed to the Circuit Court of Appeals for the Sixth Circuit, and that court has certified to this Court the single question:

Had the Interstate Commerce Commission jurisdictional power to make the order in question—all proceedings preceding said order being due and regular so far as procedure is concerned?

It is to be observed that the respective freight bureaus not only complained that the carriers made unjust and unreasonable charges, and prayed that they might be required to desist therefrom, but also alleged that they omitted and refused to carry such freight for reasonable and just compensation between the points named, and asked that they might be required to so adjust their several freight tariffs as to accomplish that result, and for such other and further order as might be necessary in the premises. (Rec. 1.)

POINTS AND ARGUMENT.

It is to be assumed, therefore, for the purposes of this argument:

1st. That there were issues duly joined before the Commission and the Court below.

2d. That there was a full hearing and investigation.

3d. That all the proceedings were regular.

4th. That upon the evidence the rates complained of were unreasonable and unjust.

5th. That the rates named by the Commission were as high as could reasonably or justly be demanded for the services rendered and benefit received.

6th. That the Commission gave due weight to every fact, failed to consider no fact it should have considered, and committed no error of law, unless it be that it exercised a jurisdiction not conferred upon it when it made the order in question.

7th. That the courts below upon the merits would have affirmed and enforced the order of the Commission according to its terms.

I.

The Social Circle Case.

The Circuit Court summarily dismissed the petition in this case without examination of its merits upon the supposition that this Court in *C., N. O. & T. P. Railway Co.* v. *I. C. C.* (162 U. S. 184), commonly called the "Social Circle Case," had, at page 196, decided that the Commission had no power, even in a case where, under section 1 of the act to regulate commerce, the reasonableness and justice of a specific set of rates were in issue, the claim made that reasonable and just rates were not charged, a full hearing had, and a conclusion properly reached by the Commission that the rates were unreasonable and unjust, to declare, in conformity with the obligation conferred upon it by section 12, "to execute and enforce the provisions of the act," what would be reasonable

and just rates, and to enforce that declaration. (Rec. 6–8.)

If that case decided or was intended to decide that proposition in that way, and such is the settled judgment of this Court, it ends this case so far as the question certified is concerned. It is submitted that that case did not so decide, that the language referred to does not necessarily bear that construction, and that, even if it can be so construed, the proposition was not necessarily involved in the decision of that case.

In the Social Circle case, a complaint was made before the Commission for violation of the "long and short haul clause," in charging from Cincinnati, Ohio, to Social Circle, Georgia, a shorter distance, a greater rate than from Cincinnati, Ohio, to Augusta, Georgia; and also for charging from Cincinnati, Ohio, to Atlanta, Georgia, a less distance, the same rate as charged from Cincinnati, Ohio, to Augusta, Georgia. This last branch of the case must have been under the first section, upon the ground that the rate from Cincinnati to Atlanta was unreasonable in itself, or under the third section that the rate of $1.07 was unduly prejudicial to Atlanta, or unduly preferential to Augusta. The reason of this is, that the rate being the same as to Augusta, the "long and short haul clause" could not apply. As this Court took into consideration, in affirming the decision of the Circuit Court of Appeals, the matter of competition as justifying the Birmingham rate, with which the Commission had compared the Atlanta rate, section 2 could

not have been in contemplation, because that section excludes, as does section 4, competition, or any other circumstance disconnected with the transportation of the merchandise, as a circumstance or condition to be considered in determining whether or not there is an unjust discrimination.

The order of the Commission had forbidden a greater charge from Cincinnati, Ohio, to Social Circle, Georgia, than from Cincinnati to Augusta, to wit, $1.07 per 100 pounds, and also a greater charge from Cincinnati to Atlanta than $1.00 per 100 pounds (the former rate having been $1.07 per 100).

The Circuit Court had reversed this order and dismissed the petition, and the Circuit Court of Appeals had affirmed the order as to the Social Circle rate, but denied the relief as to the Atlanta rate, thereby affirming the Circuit Court in that particular.

This Court (162 U. S. 184, *C. N. O. & T. P. Ry. Co.* v. *I. C. C.*), having disposed of the long and short haul feature of the case, at page 194, said that:

> "The appeal (of the Commission) presents the question whether the Circuit Court of Appeals erred in holding in respect to the action of the Interstate Commerce Commission in fixing a maximum rate of charges for the transportation of freight of the first class in less than car-loads from Cincinnati to Atlanta."

And further:

> "This question may be regarded as two-fold, and is so presented in the assignment of error, filed by the Commission, viz: Did the Court err

in holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate? And if such power existed, did the Court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?"

Without considering the first question of law, the Court proceeded to consider the question of fact as to whether or not the Atlanta rate of $1.07, found to be reasonable by the Circuit Court and Circuit Court of Appeals, was in fact reasonable and not excessive under the circumstances. If such was the fact, it rendered unnecessary the decision of the question of law, as to whether, conceding the rate of $1.07 to be unreasonable, the Commission had the right to determine what was a reasonable rate, and forbid charging more. The Court pointed out that the Commission had been largely influenced in determining that the Atlanta rate of $1.07 was unreasonable by comparing it with the rate from Cincinnati to Birmingham, of eighty-nine cents, the distance being substantially the same, and there apparently being nothing to justify such difference, or to warrant any substantial variance in the rate from Cincinnati to Atlanta, and Cincinnati to Birmingham.

The Court further pointed out that there had been evidence introduced in the Circuit Court which was not before the Commission, viz: the circumstance of competition at Birmingham, which apparently justified this difference and warranted this variance, and said:

"As both Courts found the existing rates to have been reasonable, we do not feel disposed to review their findings on that matter of fact."

It therefore contented itself with giving the railroads a rebuke for suppressing this evidence before the Commission. This decided the case, but in the opinion it is further said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix the rates, was mooted in the Courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

"It is argued, on behalf of the Commission, that the power to pass upon the unreasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."

It may be conceded that this language is more or less ambiguous. The fact that this certificate is before this Court tends to show this to be the case. It may refer to the failure of the Commission to find the facts as to the Birmingham rate. If so, the Commission in not considering those facts or giving them their proper weight prejudged the rate. It does not

clearly appear in that case that any relief was asked, because in violation of one branch of section 1 of the Act, which provides that "all rates," etc., "shall be reasonable and just," reasonable and just rates were not charged. If so, it might be contended that the jurisdiction of the Commission was not invoked as to enforcing the positive provision of the act, and no issue made or facts found in reference thereto, and hence the rate was prejudged by fixing a rate. If the only claim made was that the Atlanta rate was unreasonable and unjust, and therefor in violation of the second branch of section 1 of the act, which prohibits and declares unlawful every unjust and unreasonable charge, it might be that the jurisdiction of the Commission was only invoked in order to enforce the negative provision of the act, viz., to enjoin the unreasonable rate, and therefore that issue alone was made.

However that may be, the language is not open to the construction that the Commission under no circumstances has the power to fix a reasonable rate and to compel a common carrier to charge it.

This appears from the decision of the Court rendered at the same time in the case of *Texas and Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 216, 235.

That litigation arose out of the attempt of the Commission to promulgate a general decree or order without a hearing had or issue joined. Upon the refusal of the carriers to obey the order and upon a complaint

being made, the Commission declined to consider certain circumstances as to ocean competition as justifying an apparent preference on imported merchandise over domestic merchandise of the same kind on that part of the route within the United States.

The Court, after commenting on those facts, said, p. 235:

> "We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission or by the Courts below in respect to what were proper rates to be charged by the Texas and Pacific Railway Company. That was a question of fact, and if the inquiry had been conducted on a proper basis, we should not have felt inclined to review conclusions so reached."

In all the cases in the lower courts which have followed the Social Circle Case as a conclusive authority on this question, it seems to have been assumed that the language of the Court was, not only susceptible of but one construction, but also that it was necessary to the determination of that case. The language has simply been quoted without any discussion.

II.

The Power of the Commission.

It will be readily conceded that there is a vast difference between the powers conferred upon the Interstate Commerce Commission and the railway

commissioners of many of the states. It is simply misleading by quoting the provisions of certain state statutes, which in express terms confer the power upon such bodies to promulgate general orders and tariffs to be charged by all railroads in those states; to endeavor to conclude that the absence of such a power from the United States statute shows or even tends to show a total lack of power in the Commission to do any thing but declare after a full hearing upon issues joined that a specific rate is unreasonable, or unjustly discriminating, or unduly preferential.

It is equally misleading by quoting the provisions of other state statutes which do not contain any such provisions as are found in the United States statutes, and do not give to their respective commissioners any power to execute or to enforce such statutory provisions, to attempt to limit the powers of the Interstate Commerce Commission to those of an advisory board, and to give to its orders the force of moral lectures.

Because the Commission has not power to promulgate general decrees or orders as it attempted to do prior to the case of *Texas and Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 234, it by no means follows that, as said in that very case, its conclusions "*in respect to what were proper rates to be charged*" as the result of an inquiry "conducted on a proper basis," are either beyond the scope of its powers, or not necessarily a part of its duties.

It is a legal impossibility to find a way "to execute

and enforce the provisions of the act," when an unreasonable rate is being charged, without determining what is a reasonable rate; when an unjust discrimination is being made, without declaring what would not be such a discrimination; when an undue preference is being given or an undue prejudice being inflicted, without indicating what would not fall within that category; when more is being charged for a short than a long haul, without requiring at least the same if not a less rate to be charged.

Such an argument is not simply *ab inconvenienti*. Even that argument in a highly remedial statute such as this is entitled to some consideration. It is a necessary result from the express language of the statute.

Does the Commission execute and enforce the provisions of the act by a simple declaration that $1.00 is an unreasonable rate in a given case without declaring what is reasonable, it being enacted that all rates *shall be reasonable*; that it is an unjust discrimination to charge A. $1.00 and B. $2.00 without saying that B. should be charged also $1.00; that it is unduly preferential to A. to be charged $1.00, and unreasonably prejudicial to B. to be charged $2.00, without intimating where the preference to A. would cease to be undue and the prejudice to B. not unreasonable?

Would the Commission under such circumstance, could it in fact, be said to have recommended "what reparation, if any, should be made by the common carriers to the party . . . found to have been in-

jured," as required by section 14; or having found something "done or omitted to be done in violation of the provisions" of the act, to have performed its duty of notifying the carrier to cease and desist from such violation or to "make reparation for the injury so found to have been done," or both, as required by section 15.

And if the carrier refused and the matter was brought to the attention of the Court, could it do "justice in the premises" or "form a just judgment in the matter," or "effectually enforce any lawful order or requirement" of the Commission?

If $1.00 is found to be an unreasonable rate, what "justice in the premises" would be done by an injunction against that rate when only fifty cents was a reasonable rate under the circumstances? What would an order, requiring a carrier, as unjustly discriminating against A. or unduly preferring B., to cease or desist from charging A. 100 % more than B. when he should charge him the same rate, amount to, when he was left at perfect liberty to charge A. 99 % more than B.? And yet such is the logical result of the appellees' contention. Is it the law?

Had the Commission in this case confined itself to simply forbidding the charging of the present rates in controversy from Cincinnati and Chicago to the points designated as unreasonable, they could have been met by these defendants with the very objection it appears counsel for the carriers did make to such

an order in the case of *Coxe Bros. & Co.* v. *L. V. R. R. Co.*, 4 I. C. C. Rep. 577, 578.

The Commission in its opinion says:

> "If, impressed with the belief that the existing rates were not exorbitant, a carrier should attempt compliance with the Commissioner's conclusion that they were excessive, by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this, but, as insisted upon by counsel for the road, when we have been convinced that rates are unjust, it will be our duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the Commission in respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decides them to be, and for any reason the Commission may not determine what are, as well as what are not reasonable, the regulation provided by the statute begins with complaint and ends in confusion."

The power of the Commission to fix maximum rates in a case like the one at bar is as clearly provided for in the act as its power to enforce the provisions of sections 2, 3, and 4. Section 1 is the only positive enactment of the four. It is there declared that rates *shall be* reasonable and just, and unjust and unreasonable rates are declared unlawful and prohibited. Section 2 defines and forbids unjust discrimination, and sections 3 and 4 declare certain things

unlawful. The decisions of this Court leave undisputed the right of the Commission to enforce these sections, although negative in character. The same carriers are required to charge reasonable rates, and the Commission has the same power not only to enforce the negative side of section 1, which forbids unreasonable rates, but the positive side which commands reasonable rates.

III.

The English Legislation.

This Court has said that similar legislation by the Parliament of England renders profitable an examination of the decisions of the courts of that country construing its provisions.

Texas and Pacific Railway v. *Interstate Commerce Commission*, 162 U. S. 197, 222, 233.

The English Traffic Acts contain no provision which can be called similar to section 1 of the Act to Regulate Commerce.

Prior to 1894, although a rate might be unreasonable in itself, if it was impartially enforced as against every one, or not unduly preferential or prejudicial as between persons or localities, the English Commission had no jurisdiction in the premises.

Persons complaining of unreasonable charges were left to their remedies at common law.

By section 24 of the Railway and Canal Traffic Act, 1888, 51 and 52 Vict., c. 25, the Board of Trade of

England was authorized to and did institute an inquiry into the question of maximum rates to be charged by every railroad company in Great Britain. The provisional orders of that body fixed the maximum rates and the classification of traffic applicable to the railways specified in the orders. These provisional orders were subsequently confirmed in 1892 and 1893 by Parliament.

Railway Rates, Darlington, pp. 1, 2, 179 *et seq.*

Subsequently, by section 1, s. s. [2], of the Railway and Canal Traffic Act, 1894, 57 and 58 Vict., ch. 54 (Appendix), it was provided that in case of any direct or indirect increase of a rate or charge made after December 31, 1892, if complaint was made that the rate or charge was unreasonable, it should lie on the company to prove that the increase was reasonable, "and for that purpose it should not be sufficient to show that the rate or charge is within any limit fixed by an act of Parliament or by any provisional order confirmed by act of Parliament."

By section 1, s. s. [3], of the same act, the English Commission was given jurisdiction to hear and determine any complaint with respect to such increase of rate or charge.

Lord Esher, M.R., in the case of *Mansion House Association* v. *Great Western Railway Co.*, Law Rep., 2 Q. B. (1895) 141, decided by the Court of Appeals on a preliminary matter, used the following language at p. 145:

> "Now, what the act of 1894 has done is to add to these matters over which the Commissioners had jurisdiction a new matter. They are to have jurisdiction when a railway rate is increased, although it is increased equally to every body who comes under the rate."

This act has for the first time brought the question of reasonableness or unreasonableness of rates within the jurisdiction of the English Commission.

In the case last cited, as in this case, the Commission was asked to order the carrier to desist from charging a certain increased set of rates.

The case does not appear as yet to have been decided on its merits, but from the action of the Commission in another case where damages were assessed by reason of an increase of a rate, there is little doubt that the jurisdiction to hear and determine any complaint arising under the act of 1894 will not be construed as limiting the power of Commission to simply forbidding the increased rates in the event the increase is found unreasonable, but will also be construed to give the Commission power to decide how far such increase may or may not be reasonable.

The case referred to is that of *Rickett, Smith & Co., Limited*, v. *The Midland Railway Co.*, Law Rep. (1896), 1 Q. B. 260.

In that case the Midland Railroad had indirectly by the diminution of a wastage allowance on coal raised its rate upon the transportation of coal from certain collieries to London 3½*d.* per ton. Starting with the

presumption under the English statutes that the former rate was reasonable and the increased rate unreasonable, although less than the maximum fixed by Parliament, the English Commission proceeded to consider whether or not the circumstances disclosed by the evidence justified such increase of the rate subsequent to December 31, 1892, of 3½*d.* per ton.

It finally reached the conclusion that they did not. The Commission, however, did not stop at that point, nor content itself with finding the existing rate to be unreasonable. It went further, and, under its power to hear and determine the matter, found that an increase to the extent of twopence per ton would not have been unreasonable under the circumstances, and judgment was rendered accordingly.

It determined whether or not the increase was wholly unreasonable or only partially so, and sustained it so far as reasonable.

Section 1 of the Act to Regulate Commerce is much broader than section 1 of the Railway and Canal Traffic Act of 1894. The Interstate Commerce Commission, subject to the revision and control of the courts on questions both of fact and law, is given, it is respectfully submitted, under its powers to execute and enforce the act, to hear and determine controversies, to notify carriers to cease and desist from doing or omitting to do any thing in violation of its provisions, or to make reparation for the injury found to have been done, and to appeal to the courts to compel obedience to its lawful orders; full jurisdictional power to find

in a particular case a set of rates unreasonable, to find what are reasonable rates in a given case, and to order a carrier not only not to exact the unreasonable rates, but also to confine itself to the reasonable rates.

IV.

The Control by the Courts.

In the effort to limit the functions of the Commission and the courts under sections 12 to 16 of the Act to Regulate Commerce, to a simple restraint of an existing rate as unreasonable, the case of *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 399, is relied upon. That case has no application. Apart from any statutory provisions upon the subject, the power of a court of equity is unquestionably limited as determined in that case. It can neither establish rates nor restrain a Commission, rightfully vested with the power so to do, from again establishing other rates. But the question remains, did not Congress confer upon the Commission and the courts as to interstate commerce an entirely new jurisdiction? If it did, it is begging the question to maintain that they otherwise possessed no such power.

The supposed evils or difficulties which will result from the exercise of the power contended for can be easily magnified.

While Congress was slow to follow the lead of Parliament in subjecting to judicial control the great transportation lines of this country, when Congress

finally did act it covered, as a comparison of the statutes of the two countries will show, a wider field. While as to procedure there is a difference in detail, and while the courts of this country on questions of fact particularly are given more extensive powers in reviewing the findings of fact of the Commission than the English courts, the powers of the respective courts on questions of law, and as to affirming, reversing or modifying the orders of the respective Commissions are substantially the same.

As the legislature has imposed upon the Commission and the courts the duty of dealing with such questions, their difficulty is immaterial.

Ransome et al. v. *The Eastern Counties Ry. Co.*, 1 C. B. N. S. 437, 451.

Besides, it is not to be supposed that the Commission or the courts "will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

Reagan v. *Farmers Loan and Trust Co.*, 154 U. S. 362, 395.

The order of the Commission in this case is not a final adjudication for all time of the rates to be charged on the classes of freight named. If approved and enforced by the Circuit Court, that Court can so

frame its order as to leave full scope to a change of rates at any time, upon a proper showing on the part of the carriers of a change of circumstances and conditions justifying a change of rates.

Congress attempted by the legislation in question to afford an adequate and complete remedy, so far as interstate traffic is concerned, for abuses perpetrated by the transportation lines of this country upon individuals, corporations, localities, and sections of the country.

If the question certified to is answered in the negative, it is plain that those abuses, where they still exist, can continue to flourish without any real restraint.

Respectfully submitted,

HARLAN CLEVELAND,

Of Counsel for Appellant.

APPENDIX.

I.

The Act to Regulate Commerce.

"SEC. 1. That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment from one State or Territory of the United States or District of Columbia, to any other State or Territory of the United States, etc. . . . . All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, re-

English Railway and Canal Traffic Acts.

SEC. 1. Railway and Canal Traffic Act, 1894, 57 and 58 Victoria, ch. 54.

"Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament."

SEC. 90 of the Railway Clauses Act, 1845, 8 and 9 Vict., c. 20. "And whereas it is expedient that the company should be

bate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this

enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the Special Act contained, from time to time to alter or vary the tolls by the Special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

SEC. 2. Railway and Canal Traffic Act, 1854, 17 and 18 Victoria, ch. 31.

act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorising any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation

"No railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

of passengers or property: and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 16. (As amended March 2, 1889.) "That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its

SEC. 17. (Railway and Canal Traffic Act, 1888, 51 and 52 Vict., ch. 25.)

"(1.) No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the *locus standi* of a complainant.

(2.) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal.

(3.) An appeal shall not be brought except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the superior court of appeal.

(4.) On the hearing of an appeal the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court, and may make any order which the Commissioners could have made, and also any such further or other order as may be just, and the costs of

officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same. . . .

and incidental to an appeal shall be in the discretion of the court of appeal, but no Commissioner shall be liable to any costs by reason or in respect of any appeal.

(5.) The decision of the superior court of appeal shall be final: Provided, that where there has been a difference of opinion between any two of such superior courts of appeal, any superior court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such court shall determine.

(6.) Save as provided by this act, an order or proceeding of the Commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise.

II.

[INTERSTATE COMMERCE ACT—*Continued.*]

"SEC. 12. (*As amended* March 2, 1889, and February 10, 1891) . . . and the Commission is hereby authorized and required to execute and enforce the provisions of this act. . . ."

"SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of any thing done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If the carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. . . ."

"SEC. 14. (As amended March 2, 1889.) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found. . . ."

"SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that any thing has been done or omitted to be done in violation of the provisions of this act, or of any

law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS
PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF BY MR. GEORGE F. EDMUNDS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *et al.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT ON APPEALS FOR THE SIXTH CIRCUIT.

Brief by Mr. George F. Edmunds on behalf of the appellant, on the question of the JURISDICTIONAL POWER of the Interstate Commerce Commission to make the order it did in this case, that the charge exacted by the carriers in respect of the particular goods in question should not exceed a certain named sum which the Commission, upon complaint, answers, issues, proofs, and hearing, found to be reasonable and just.

I. It is submitted with respectful confidence that *the interstate commerce law is in all its* CIVIL *aspects a* REMEDIAL *one.*

At the time of its passage the railway carriers were the absolute and irresponsible masters of all interstate commerce. The several States in trying to break up, or at least to mitigate, the unjust tyranny of these great corporations and combinations that held the largest part of the intercourse of the people in their grasp (and which in many instances undertook to control political as well as commercial affairs), found themselves baffled and practically defeated in their efforts by the national constitutional provision that only Congress could regulate interstate commerce. In this state of affairs, and to redress such enormous grievances, the interstate commerce act was passed for the intended benefit of the whole body of the citizens of the Republic having a common grievance and a common interest in the vast commercial intercourse between all the States. This legislation was, therefore, in the very highest sense, and to the last degree, REMEDIAL.

II. Being thus remedial, the statute ought to be construed liberally to the attainment of the ends in view. Instead of being given the narrowest possible application and construction, it should, it is humbly submitted, be applied and construed by the judiciary in the largest latitude fairly consistent with its language. It ought not to be frittered away by the refinements of criticism, or made ineffectual because it does not possess all the inclusive and exclusive qualities of a plea in abatement, and may not be "certain to a certain intent in every particular." It is, perhaps, questionable taste for the bar to cite authority for this proposition, but it may be permitted to refer to a few of the vast number of the authorities on the subject: 2d

Pet., 627, Wilkinson *vs.* Leland; 7th Wall., 219, Silver *vs.* Ladd; 12th Pet., 102, Beaston *vs.* Farmers' Bank; 6th Pet., 29, U. S. *vs.* Bank of North Carolina; 18th Pet., 107, Bank of U. S. *vs.* Lee; Broom's Legal Maxims (fifth American edition from third London edition) [p. 80].

III. But the contention on the other side is that, while the Commission has power to decide what shall *not* be done, it has no power in the very same case to do complete justice by declaring what *shall be* done by the carriers in the given matter. We may well quote here the language of Broom's Legal Maxims: "Again, in construing "an act of Parliament, it is a settled rule of construction "that cases out of the letter of the statute, yet within the "same mischief or cause of the making, thereafter shall be "within the remedy thereby provided; and, accordingly, it "is laid down that for the sure and true interpretation of "all statutes (be they penal or beneficial, restrictive or en- "larging of the common law) four things must be con- "sidered: (1st) What was the common law before the "making of the act; (2d) What was the mischief for which "the common law did not provide; (3d) What remedy "has been appointed by the legislature for such mis- "chief; and (4th) The true reason of the remedy. "And then the duty of the judges is to put such "a construction upon the statute as shall suppress the "mischief and advance the remedy—to suppress the subtle "inventions and evasions for continuing the mischief *pro* "*privato commodo*, and to add force and life to the cure and "remedy according to the true intent of the makers of the "act, *pro bono publico*. In expounding remedial laws, then,

"the courts will extend the remedy so far as the words will "admit." It is submitted that the words of the statute in question do not require the application of the foregoing rules, being too plain for their application. If they are not, then the rule should be applied.

IV. What, then, is the statute? At the risk of reiteration, I quote the crucial parts of some of the sections bearing on the subject of this brief:

"SEC. 1. * * * All charges made for any services "rendered or to be rendered in the transportation of "passengers or property as aforesaid, or in connection "therewith, or for the receiving, delivering, storage, or "handling of such property, *shall be reasonable and "just;* and every unjust and unreasonable charge for "such service is prohibited and declared to be unlaw- "ful."

"SEC. 2. That if any common carrier subject to "the provisions of this act shall, directly or in- "directly, by any special rate, rebate, drawback, "or other device, charge, demand, collect, or re- "ceive from any person or persons a greater or less "compensation for any service rendered or to be ren- "dered in the transportation of passengers or property, "subject to the provisions of this act, than it charges, "demands, collects, or receives from any other person "or persons for doing for him or them a like and con- "temporaneous service in the transportation of a like "kind of traffic, and under substantially similar cir- "cumstances and conditions, such common carrier shall

"be deemed guilty of unjust discrimination, which is "hereby prohibited and declared to be unlawful."

"SEC. 3. That it shall be unlawful for any common "carrier subject to the provisions of this act to make "or give any undue or unreasonable preference or "advantage to any particular person, company, firm, "corporation, or locality, or any particular description "of traffic, in any respect whatsoever, or to subject any "particular person, company, firm, corporation, or "locality, or any particular description of traffic to any "undue or unreasonable prejudice or disadvantage in "any respect whatsoever."

"SEC. 4. That it shall be unlawful for any common "carrier subject to the provisions of this act to charge "or receive any greater compensation in the aggregate "for the transportation of passengers or of like kind of "property under substantially similar circumstances "and conditions for a shorter than a longer distance "over the same line in the same direction," &c.

Secs. 6 and 7 control the regulation of through rates, and provide against devices to break up continuous transportation, and for a general control of the Commission over that subject.

Sec. 9 provides that persons claiming to be damaged in respect of the matters embraced in the acts may complain to the Commission.

Sec. 11 establishes the Commission, and secures to it a non-partisan character and a freedom from private interest or bias.

SEC. 12 (as amended): "That the Commission hereby "created shall have authority to inquire into the man- "agement of the business of all common carriers sub- "ject to the provisions of this act, and shall keep itself "informed as to the manner and method in which the "same is conducted; and shall have the right to obtain "from such common carriers full and complete infor- "mation necessary to enable the Commission to per- "form the duties and carry out the objects for which it "was created; and THE COMMISSION IS HEREBY AUTHOR- "IZED AND REQUIRED TO EXECUTE AND ENFORCE THE "PROVISIONS OF THIS ACT;" * * * "and for the pur- "poses of this act the Commission shall have power to "require by subpœna the attendance and testimony of "witnesses, and the production of all books, papers, tar- "iffs, contracts, agreements, and documents relating to "any matter under investigation." * * *

SEC. 13. "That any person, firm, corporation, or as- "sociation, or any mercantile, agricultural, or manu- "facturing society, or any body politic or municipal "organization complaining of *anything done* or *omitted* "*to be done* by any common carrier subject to the pro- "visions of this act in contravention to the provisions "thereof, may apply to said Commission by petition, "which shall briefly state the facts; whereupon a state- "ment of the charges thus made shall be forwarded by "the Commission to such common carrier, who shall "be called upon to *satisfy* the complaint or to answer "the same in writing within a reasonable time to be "specified by the Commission. If such common carrier,

"within the time specified, shall make *reparation* for "the injury alleged to have been done, said carrier shall "be relieved of liability to the complainant only for "the particular violation of law thus complained of. "If such carrier shall not satisfy the complaint within "the time specified, or there shall appear to be any rea- "sonable ground for investigating said complaint, it "shall be the duty of the Commission to investigate the "matters complained of in such manner and by such "means as it shall deem proper." * * *

SEC. 14. "That whenever an investigation shall "be made by said Commission, it shall be its duty "to make a report in writing in respect thereto, "which shall include the findings of fact upon "which the conclusions of the Commission are "based, together with its recommendation as to "what *reparation*, if any, should be made by the "common carrier to any party or parties who "may be found to have been injured, and such "findings so made shall thereafter, in all judicial pro- "ceedings, be deemed *prima facie* evidence as to each "and every fact found." * * *

SEC. 15. "That if in any case in which an investiga- "tion shall be made by said Commission it shall be "made to appear to the satisfaction of the Commission, "either by the testimony of witnesses or other evidence, "that anything has been *done* or *omitted to be done* in "violation of the provisions of this act, or of any law "cognizable by said Commission, by any common

"carrier, or that any injury or damage has been sus-
"tained by the party or parties complaining, or by
"other parties aggrieved in consequence of any
"such violation, it shall be the duty of the Commis-
"sion to forthwith cause a copy of its report in respect
"thereto to be delivered to such common carrier, to-
"gether with a notice to said common carrier to *cease*
"*and desist from such violation*, or to make *reparation*
"for the injury so found to have been done, or *both*."
* * *

SEC. 16. "That whenever any common carrier as de-
"fined in and subject to the provisions of this act shall
"violate or refuse or neglect to obey or perform any
"lawful order or requirement of the Commission created
"by this act," * * * "it shall be lawful for the
"Commission, or for any company or person interested
"in such order or requirement, to apply in a summary
"way, by petition to the circuit court of the United
"States, *sitting in equity*," * * * "alleging such
"*violation* or *disobedience*, as the case may be; and
"the court shall have power to hear and determine the
"matter, on such short notice to the common carrier
"complained of as the court shall deem reasonable;"
* * * "and said court shall proceed to hear and
"determine the *matter* speedily as a *court of equity*"
* * * "*in such manner as to do justice* in the *premises*;
"and to this end such court shall have power, if it think
"fit, to direct and prosecute in such mode, and by such
"persons as it may appoint, all such inquiries as the
"court may think needful to enable it to form a *just*
"*judgment* in the *matter* of such petition." * * *

These sections, by general, comprehensive, and specific language (only short, possibly, of the inclusive and exclusive strictness and fullness required in pleas in abatement at common law), place within the jurisdictional power and duty of the Interstate Commerce Commission the investigation, hearing, and determination of *all questions* of dispute between the public and its component citizens and localities and the carriers. There is no limitation of the clear phrases of these various sections. The duty of the carrier is set forth in *all its aspects*, both of *affirmative duty* and of *prohibition*. The first section requires that "*all charges shall be reasonable and just.*" The second section prohibits special personal favoritism by secret devices. The third section prohibits preferences between persons or localities and kinds of traffic. The fourth section prohibits charging more for a shorter than for a longer distance. The twelfth section provides that the Commission shall have authority to "inquire into the management of the business of all com-"mon carriers," and that "the Commission is hereby au-"thorized and required to execute and enforce the provis-"ions of this act." There is no part of it that the statute does not *expressly* require the Commission to cause to be *completely* executed. The method of this execution is pointed out by the prescribed modes of procedure provided for in sections 13, 14, 15, and 16. And all this to be done on due application, under due procedure of notice, evidence, and hearing of all the parties. How, then, can it be said by the most hypercritical refiner that the Commission has no jurisdiction to decide, for instance, what *is* "reasonable and *just*" as provided in section

1? Has the Commission only the power to repeat the words of the statute, and say to the carrier proved to be guilty of extortion, "You must desist from extortion, and be reasonable and just?" Would not that be a palpable mockery of either administrative or judicial justice?

If the statute had contained only the first and twelfth sections with the procedure sections, could this court doubt the *power* of the Commission to decide the matter, and require the very conduct on the part of the carrier that the Commission had found to be "reasonable and just?" To hold otherwise would be to ignore and flout the plainest possible use of language, if the statute be within the competence of Congress to pass.

But the rightful power of Congress to enact the law is not disputed. That the legislative department of any government, State or National, has power to regulate the conduct of any full or *quasi* public business, is too obvious for discussion. State legislatures, in respect of their internal commerce and polity, possess and have always exercised the power of controlling all such business through agents (by whatever names they may be called), to whom is deputed the execution of the sovereign will according to the principles and rules laid down by the legislative power. The innumerable instances of this need not be cited. Indeed, government could not be and it never has been carried on in any other way.

Again: Section 2 prohibits the unjust discrimination between persons, *i. e.*, between the traffic that citizens may be engaged in, or between citizens engaged in the same traffic. The Commission is, by the proper methods of procedure, to "*enforce*" this provision. Is the power of the Com-

mission exhausted in saying to the discriminating carrier, "You shall not discriminate," and stop there? Must it not say, if it does its duty in enforcing the act and redressing the grievances found to exist, that it will enforce the law by deciding what the *nature and degree* of the discrimination is, and by requiring that such degree of discrimination shall be effaced altogether by affirmative conduct of equality or by a charge of no more than the ascertained rightful sum to the parties aggrieved?

Without referring in detail to the other provisions of the statute above quoted, it is safe to say that the plain purpose and clear, comprehensive language of the act show that the *whole* and *all* of the duties and obligations of the carrier to its customers and toward localities, &c., are to be enforced by the Commission—not a part of them, not a half of any of them, but all and every part of all of them. It is like algebra, in which neither side of the equation can possibly be considered or worked without the other. A complaint may be filed before the Commission (as in this case) alleging that the carrier ought not to charge for a described service more than the just and reasonable sum of fifty cents the hundred pounds while, in fact, it is exacting one dollar the hundred pounds. Suppose the carrier appears and confesses that fifty cents per hundred is a reasonable and just price and that it does exact one dollar, but insists that the Commission has no jurisdiction to require the confessed reasonable charge to be made, and that it only has jurisdiction to require the cessation of the one dollar exaction, thus leaving the carrier to continue to plunder its customers of forty-nine cents per hundred with absolute impunity, so far as the Commission is

concerned, until a new complaint shall have been instituted and the forty-nine cent charge again declared to be unreasonable. That this is shocking to all our *natural* sense of justice no one can dispute. Why, then, should the broad, comprehensive, and specific language of the statute be "cabined, cribbed, confined" to produce such a state of the law? The citation from Broom may be well remembered in this connection.

The statute certainly requires the carrier to *refrain from exacting more than a reasonable price* (section 1); to refrain from drawbacks, rebates, &c., and all other unjust discriminations (section 2); to refrain from giving preferences or unequal advantages to persons or localities (section 3); to refrain from exacting more for a short than for a long haul (section 4); to refrain from all devices to break up continuous passage from road to road (section 7). I repeat in this connection that section 12 provides that the Commission shall have authority to "inquire into the management of the busi-"ness," &c., and to obtain "full and complete information "necessary to perform the duties and carry out the objects "for which it was created." And I repeat the inquiry, what were the duties and objects for which it was created? The same section answers the question in terms so clear that neither cavil nor sophistry can confuse or obscure them.

V. But it is said that the Commission is not a judicial body, and cannot exercise *judicial powers*. Granted, in the strict sense of the terms; but in every civilized country administrative officers have always lawfully exercised many powers in every department of government which are in their nature judicial; for every power which involves the

exercise of judgment, opinion, and decision is of that nature. Such are the powers exercised by the Secretary of the Interior as to many land questions; the Secretary of the Treasury and some of his subordinates as to customs, &c.; the various Commissions that have existed from time to time for nearly a century to settle land claims, and many others.

That Congress had the power to establish interstate "rates" in the largest sense of the word cannot be doubted, and that it had the power to establish a Commission to do the same thing is, it is submitted, equally clear. It is assumed, for the purpose of this case, that it did neither in the sense to which I am now referring. It adopted a policy short of this, and provided clear descriptions and requirements concerning the duties of the carriers in *all the aspects* that touch their conduct toward their patrons and toward the localities and sections of the country and established the Commission to execute and enforce *all these provisions*—not a part of them and not a part of any one of them; not negatively merely, but affirmatively and fully, to the end that *real conformity* by the carrier to the requirements of the act should be obtained, and, as the act declares, obtained speedily, by procedure formal and ceremonious, in which all parties in interest were to be heard, and it provided for a decision of the particular question and the particular grievance thus brought to the attention of the Commission and examined by it; and in case of refusal to obey, the act provided for a suit to be brought in a judicial court of "equity," which court is required "to hear and determine "the *matter* speedily *as a court of equity*," with all that the

phrase implies. The Commission is to inquire into "*anything done* or *omitted to be done*" by any common carrier subject to the provisions of the act in contravention to the provisions thereof; and it authorized the Commission to require the carrier to "satisfy the complaint" or answer, and then, after hearing, to require the carrier "to cease and "desist from such *violation* or to make *reparation*, or *both*." How can this be done short of a decision upon the *whole* matter? To again illustrate, let it be supposed that the sole complaint was that the carrier was exacting double what was just and reasonable for a particular service, and that this, on due notice to both sides, was found to be true. This would be a palpable violation of the act; but the Commission is authorized to require the carrier to cease and desist from doing that very wrong. Does the carrier do so unless and until he reduces his exaction to the true point of justice and reason? To hold otherwise it would be, it is submitted, trifling both with grammar and common justice. If the statute had conferred the very same power, and in the very same words, upon a court of equity instead of the Commission, could the power of the court to redress the whole grievance be doubted? But the admitted power of the Commission to command the desistance from a charge of one hundred cents per hundred pounds is no less "judicial" than a requirement not to charge more than the sum found to be reasonable and just; and the two things are precisely the same in principle and legal effect and are inseparable.

On the subject of "*reparation*," provided for in section 3, I observe again that this section is to be enforced by the Commission. How is this *possibly* to be done otherwise

than by commanding *action* by the carriers suited to the nature of the case, so as to obliterate the whole undue preference, &c., and how possibly otherwise can reparation be made to a locality? Reparation means "restoration" of the right. No *such* exercise of the power by the Commission is either "fixing rates" or prejudging a matter, as referred to by Mr. Justice Shiras in the Social Circle case.

VI. The words "lawful order" mean an order the Commission has *jurisdiction* to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to "hear and determine the *matter*"—that is, the whole subject, "as a court of equity, * * * in such "manner as to do *justice* in the *premises*"—that is, complete justice in the whole premises. "Premises" is not merely the particular order that the Commission has made, but it is the whole subject that had been duly brought before the Commission, and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court and is now imposed upon this Court.

All the preceding action described is not "fixing rates" in the sense that State commissioners of railways are authorized by their legislatures to establish general rates for all classes and for all railways, as is contended for by the defendants. We make no such claim. The action of the Commission and the action of this Court on what is really an appeal from and a review of its judgment is the trial and

determination of a particular case, and determining for that particular case what the conduct of the carrier shall be in respect of the particular dispute involved in it. It is the exercise of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general. If this distinction be observed, there is no difficulty whatever. This is precisely in accord with what Mr. Justice Shiras said. After stating what had happened before the Commission and stating that in the circuit court evidence was introduced which had not been laid before the Commission, showing that the rate to Birmingham had been forced down by the coming in of a new competitive road, and that the circuit court had thereupon found that the evidence was sufficient to overcome the findings of the Commission, and that the rate complained of was not unreasonable; and after stating that the circuit court of appeals had adopted the views of the circuit court in respect of the reasonableness of the rate from Cincinnati to Atlanta, and "as "both courts found the existing rate to have been reasonable, "we do not feel disposed to review their finding on the mat-"ter of fact." He then condemned the conduct of the carriers in lying by. He then says: "Whether Congress "intended to confer upon the Interstate Commerce Com-"mission the power to itself fix rates was mooted in the "courts below and is discussed in the briefs of counsel." He says: "We do not find any provision in the act which ex-"pressly or by necessary implication confers such power," and so forth. He then says: "The reasonableness of the rate "in a *given case depends on facts, and the function of the Commis-"sion is to consider these facts and give them the proper weight.* If "the Commission, *instead* of withholding judgment in such a

"matter *until an issue shall be made and the facts found*, itself fix "a rate, *that* rate is prejudged by the Commission to be reasona- "ble." In this proposition we entirely concur; but in this case the identical question *was raised* by the petitions, an issue *was made*, evidence *was taken* on both sides, and the *facts found*, so that the sum fixed as reasonable by the Commission *was not* prejudged. And he adds that "subject to "the two leading prohibitions that their charges shall not "be unjust and unreasonable, and that they shall not "unjustly discriminate so as to give undue preference or "advantage, or subject to undue prejudice or disadvan- "tage persons or traffic similarly circumstanced, the "act to regulate commerce leaves common carriers as they "were at common law." Here again it will be seen that reasonableness and unreasonableness, justice and injustice, preference, advantage, prejudice, disadvantage are the very subjects that he says are within the competence of the Commission to determine. If the Supreme Court had been of opinion that the action of the Commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power, they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirm the judgment of the circuit court and the Court of Appeals upon the express ground that the Commission was in error in its finding of fact.

VII. The judiciary of the United States have recently been able, without the special aid of any act of Congress, to preserve the interstate carriers from being despoiled by unlawful interference with their operations. It is to be hoped for the good name of Congress and for the public welfare

and contentment that the same judiciary will find that Congress has adequately provided for protecting the people from being despoiled by the carriers, and that it is within the clear competence of the Commission and the courts to make these provisions effectual.

GEO. F. EDMUNDS,
Of Counsel for the United States.

Office Supreme Court, U.
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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Condensed Statement of Points Submitted by Mr. Edmunds for the Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

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THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *et al.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT ON APPEALS FOR THE SIXTH CIRCUIT.

I. The testimony before the Commission completely proved the complainants' case. There was the evidence of several witnesses extensively engaged in various kinds of business, as well as railway gentlemen, showing beyond all fair dispute the unreasonableness in themselves of the rates from Cincinnati and Chicago to Southern points, and also

the undue preference given by the established rates to Eastern cities and localities. The defendants evidently intended to lie by, as their custom had been, but they did introduce one or two witnesses whose testimony rather tended to support than to rebut the complainants' evidence; and the written documents of their agreements and proceedings furnish the key to the whole of the concerted tyranny that was established by the Southern Railway and Steamship Association and its allies.

There is submitted herewith a memorandum of the points of the testimony adduced before the Commission and of that adduced in court, including that in the private suit of Shinkle *et al.*, which is in by stipulation, which may be useful as a reference index. A few tables and documents are also collated. The proceedings of the Commission are a part of the bill of complaint.

II. As to the powers of the Commission:

(*a.*) To enforce the act, section 12;

(*b.*) Methods of doing it.

May have United States institute *direct* proceedings for the enforcement of its provisions *and* for punishment. These are two distinct powers. The first is to be exercised on notice and investigation and decision, as in any judicial tribunal; the second, in causing criminal procedure against offenders.

Suppose in this matter the Commission had found on its own inquiry that section 1 had been violated by the failure of the railway to maintain "reasonable" rates, and had instituted direct proceedings in the circuit court to

compel obedience to the requirements of that section, could not the court have power to decree the observance of the prices it should find to be reasonable? Or could it only say that the prices exacted must not be continued, and stop there? Is this at all consistent with the requirements of another section of the act, that the court shall proceed in the enforcement of it as a court of equity, and in such a manner as to do justice? Such a question furnishes, we submit, its own answer.

III. If the foregoing be true, can it be doubted that the Commission, in exercising its duty in the enforcement of section 1, could require the railroad to do the same thing, and if it fail to do it, apply to this court to compel obedience?

IV. As to the action of the Commission in trying the matter, the thirteenth section declares that any person, &c., "complaining of anything done or *omitted* to be done" may apply; whereupon the Commission shall notify the carrier and call on him to satisfy the complaint, or answer. It then provides that if the carrier shall make "*reparation*," &c., no further proceedings shall be had. Does not this mean that if the carrier shall have reduced his rates to a reasonable point no further proceeding shall be had? Could it be said that the carrier had made reparation if the extortion were twenty cents a hundred and he only reduced five? Obviously not! It is clear, then, that the reparation required is the whole of that conduct which the word "reparation" principally means, and that short of doing that the proceeding shall go on, and that the Commission shall have

power to require *all* that the carrier is bound by law and justice to do.

The fourteenth section provides that if such reparation shall not be voluntarily made by the carrier, the Commission shall decide and make "recommendation as to *what* reparation, if any, should be made." This is as clear as language can make it, that the Commission is to have power to determine *what* the carrier ought affirmatively *to do*, and not merely the power to say what the carrier ought *not* to do.

The fifteenth section provides that in such a case the Commission, if anything is found "to have been done or *omitted* to be done to the injury *or* damage of any person," &c., shall notify the carrier to "desist from such violation or to make *reparation* for the injury so found to have been done, or both." Here are two things that the Commission is to require the carrier to do: First, to desist from violation; and, second (if he has not already desisted), to make reparation. Here again, in clear language, is authority to require not only the stopping of the existing exaction, but the affirmative action on the part of the carrier to make his conduct conform to the law. The first section says that the charge must be reasonable. The Commission is to require that to be done, and of course it is impossible to decide that the carrier shall be reasonable without saying, as an inseparable part of such a decision, what is reasonable. To stop by saying that the carrier shall be reasonable would amount in substance only to a moral lecture.

Then section 16 provides for an application to the court in cases where the carrier refuses to obey the order of the Commission.

The words "lawful order" mean an order which the Commission has *jurisdiction* to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error in judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to "hear and determine the *matter*"—that is, the whole *subject*, "as a court of equity * * * in such manner as to do *justice* in the *premises*"—that is, complete justice in the whole premises. Premises is not merely the particular order that the Commission have made, but it is the whole subject that had been duly brought before the Commission and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court is now imposed upon this court.

V. All the preceding action described is not "fixing rates" in the sense that State commissioners of railways are authorized by their legislatures to establish general rates for all classes and for all railways, as is contended for by the defendants. We make no such claim. The action of the Commission and the action of this court on what is really an appeal from and a review of the judgment is the trial and determination of a particular case and determining for that particular case what the conduct of the carrier shall be in respect of the particular dispute involved in it. It is the exertion of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general. If this distinction be observed, there is no difficulty whatever. This is pre-

cisely in accord with what Justice Shiras said. After stating what had happened before the Commission, and stating that in the circuit court evidence was introduced which had not been laid before the Commission, showing that the rate to Birmingham had been forced down by the coming in of a new competitive road, and that the circuit court had thereupon found that the evidence was sufficient to overcome the findings of the Commission, and that the rate complained of was not unreasonable; and after stating that the circuit court of appeals had adopted the views of the circuit court in respect of the reasonableness of the rate from Cincinnati to Atlanta, and "as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact," he then condemned the conduct of the carriers in lying by. He then says, "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel." He says, "We do not find any provision of the act which expressly or by necessary implication confers such power," and so forth. He then says, "The reasonableness of the rate in a given case depends on facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fix a rate, that rate is prejudged by the Commission to be reasonable." In this proposition we entirely concur, but in this case the identical question was raised by the petitions, an issue was made, evidence was taken on

both sides, and the facts found, so that the sum fixed as reasonable by the Commission was not prejudged. And he adds that, "subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law." Here, again, it will be seen that reasonableness and unreasonableness, justice and injustice, preference, advantage, prejudice, disadvantage, are the very subjects that he says are within the competence of the Commission to determine. If the Supreme Court had been of opinion that the action of the Commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power, they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirm the judgment of the circuit court and the court of appeals upon the express ground that the Commission was in error in its finding of fact.

VI. Section 3 provides against "any undue or unreasonable preference or advantage to any * * * locality, or any particular description of traffic," &c.

Section 3 is to be *enforced by the Commission*. How this is *possibly* to be done otherwise than by commanding *action* by their carriers suited to the nature of the case, so as to obliterate the whole "undue preference," &c.? And how possibly otherwise can "*reparation*" be made to a "locality"? Reparation means "restoration" of the right.

VII. The circuit court had full power to decree what the Commission ought to have required in any case within its jurisdiction, and this is precisely what the court of appeals did, and what the Supreme Court affirmed in the Social Circle case. In the present case the Commission ordered two things: First, that the defendants desist from charging their then existing prices, and, second, that the defendants do not charge more than a named price, which the Commission found to be reasonable and non-preferential. If what the Commission thus decided was right upon the whole facts of the case as they now appear, where is the want of power in this court to affirm their judgment; or, if the Commission was wrong in degree, why has not this court, under the positive command of the statute to do justice in the premises, the power to say what ought to be done? It is the duty of the courts to endeavor, so far as the language of the act will allow, to execute its spirit and purpose. The act is in all civil respects a remedial act, and is therefore entitled to be liberally construed, if a liberal construction to effect its purpose be necessary. But in this case we need invoke no such principles, for, we submit, the language of the act is clear.

VIII. Every essential and nearly every primary fact found by the Commission is really unchallenged, and, if challenged, is clearly supported by the whole tenor of the oral and documentary evidence. Only the conclusion of unreasonableness in price and the conclusion of undue preference are disputed.

The fundamental and detailed circumstances of the whole case were developed before the Commission. Wit-

nesses were examined and documents produced on both sides. The additional evidence does not change any of the facts and circumstances appearing before the Commission. There are discussions and speculations and opinions in abundance from the defendants' witnesses, speaking under the strongest bias.

By their own account of the conduct of their own lines toward each other they are in the frequent habit of exercising bad faith and doing secretly what they had solemnly engaged they would not do. Testimony from such sources (particularly mere opinions) is not entitled to much consideration against the great leading facts of the railway and steamship association contract and the contrivances attending them and their conduct appearing in the case.

The evidence of the complainants' witnesses before the Commission shows distinctly the unreasonableness of the prices, and *very* distinctly the undue preference for Eastern territory accomplished by the association contract and by the territorial lines which the carriers will not allow to be crossed.

The unreasonableness of the prices was attempted to be defended by the defendants' witnesses on the ground that the lines north of the Ohio fix their own rates and the lines south of the Ohio fix theirs, and that the shippers had no right to look at the distances, &c., traversed by the lines on both sides of the Ohio as one system. This contention is exploded by the decision in the Social Circle case, where it was held that if the carriers went into the business of through traffic at all the reasonableness, and so forth, of the

THE LAW ... OF PHILADELPHIA

whole rate from the point of shipment to the point of destination was to be considered together.

In spite of the assertions of some of the defendants' witnessess that distance has nothing to do with the fixing of prices for carriage, it appears from their own testimony, as well as all the other evidence, that in every transaction between themselves and in every aspect of carriage their results, divisions of receipts, and their management are based almost, if not quite, entirely upon that very thing. And in the internal considerations of every company we find that they make up their conclusions of gain or loss from statistics and accounts kept in respect of distance and mileage, and so forth. And it is obvious enough that the truth of the cost and profit of their operations can be ascertained only in that way, and out of that what the carrier may consider to be a reasonable price (from his point of view) for carriage is determined. We refer, as a matter of public knowledge, for illustration of this, to the printed annual reports of the Lake Shore system; and the same thing will be found in all, or nearly all, of the full and detailed printed reports of great numbers of railways of the country.

Applying these principles and practices to the case in hand, we will take from the undisputed record a single illustration to show the enormous disparity between the Eastern and Western traffic, based on the railway's own established constructive mileage:

> New York to Knoxville: Constructive miles, seven hundred and sixty-three; rate, one hundred cents per one hundred pounds; equals thirteen one-hundredths of a cent per mile.

Chicago to Knoxville: Five hundred and sixty miles; rate, one hundred and sixteen cents per one hundred pounds; equals twenty one-hundredths of a cent per mile.

Cincinnati to Knoxville: Two hundred and ninety miles; rate, seventy-six cents per one hundred pounds; equals twenty one-hundredths of a cent per mile.

On the New York rate the rate from Chicago to Knoxville would be seventy-three and eight-tenths cents per one hundred pounds instead of one hundred and sixteen cents per one hundred pounds.

All the details of rates prove in general the same great disparity.

Again, the eastern distance is only computed from New York, so that the whole great territory to the north and east of New York gets the same rate that New York itself does. This operates in respect of a great many articles to give the territory one hundred or more miles further from the points of delivery that much greater advantage over the territory of which Chicago and Cincinnati are the typical points.

No witness for the defendants even has said that they cannot carry at a great profit at the prices fixed by the Commission.

IX. As to the undue preference, the principal and apparently only answer that the defendants' witnesses make is that if the Western rates were reduced, the Eastern rates would be reduced also. If this should be so, it furnishes no

reason for this court hesitating to do justice. The consequences must take care of themselves. It is monstrous to maintain that, if the carriers are compelled to do right, they will, as between themselves, proceed (in the elegant language of the defendants' counsel) "to cut each other's throats." If they do, the Eastern and Western territory will stand on an equality, and the rates, it may be presumed, will not then be grossly unreasonable as against the shipper.

It is earnestly contended by the defendants that such a reduction as is required by the Commission will make a great diminution of revenue. This may or may not be so, but the stopping of every extortion necessarily diminishes the profits of the extortioner. It is submitted that this is no reason for the Commission or this court failing to require conduct on the part of the carriers that is right in itself.

X. The real key and fortress of this whole injustice on the part of the carriers is found in the treaty between the defendant lines known as the "Southern Railway and Steamship Traffic Association Contract." An agreement to maintain certain rates, so long as they shall be reasonable and so long as they shall not make undue discrimination between persons and localities, is perfectly lawful for carriers to make; but an agreement that carriers shall divide the country or any part of it into sections and make prohibitory rates, as they themselves say they have done, on business crossing the line, establishes an absolute monopoly, and, it is submitted, is as clearly a violation of the interstate commerce law and of the trust law as it is at common law. This was the very purpose as well as the

effect of the contract. The resolutions adopted at the meetings and by the various committees all absolutely demonstrate this purpose.

It is said by the defendants that everything must be right because manufacturers in the West have increased. This does not follow at all. Manufacturers in the West have increased in spite of the injustice of these transactions between the carriers, and these manufacturers have been compelled to find their chief market in the great and growing Northwest, and have been kept out of the South in a very large degree in consequence of this monopolistic tyranny.

We refer on these subjects in general to the testimony of the complainants' witnesses, taken before the Commission, and to the testimony of the defendants' witnesses: Eger, pages 197, 198, 199; Peck, page 405; Davant, page 208; Culp, page 267; Smith, page 784; and see especially complainants' witnesses before the Commission: Mann, pages 16, 17; Reed, pages 16, 17, 18.

XI. The alleged water competition set up to explain the obvious inequality of Eastern and Western rates is completely disposed of by the value and effect of the water competition having been by the railway and water carriers themselves ascertained and defined by treating three miles of water as equal to one mile of rail transportation, and the contention that outside of that there are tramp and sailing vessels (pages 212–279) is also disposed of, though these can have no real influence upon the subject, by the testimony of one or more of the defendants' witnesses stating that they do not allow these vessels to compete for the kind of traffic that can have any play in the consid-

eration of the present questions; and it is obvious enough that the difficulties attending shipments and unlading by tramp steamers to connect with the lines of these railways would make it impossible to accomplish anything; and as to sailing vessels, nothing but the coarsest and least valuable commodities, in respect of which time and safety play a very small part, can be carried at all.

GEO. F. EDMUNDS,
Of Counsel for the United States.

167-479

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Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., Et Al.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ARGUMENT.

ED. BAXTER,
Of Counsel for Appellees, as of Record.

FOSTER & WEBB PRINT, NASHVILLE, TENN.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 783.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., Et Al.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PART I.

STATEMENT OF CASE.

Proceedings Before The Commission.

The Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau, both mercantile societies, separately complained to the Interstate Commission that the defendants in this cause, who are common carriers, subject to the provisions of the Act to Regulate Commerce, did, in contravention of said Act, make for services rendered, and to be rendered in the transportation of property, between various places in different States named in said complaints, unjust and unreasonable charges, and did make in such service unjust and unreasonable exactions upon interstate traffic represented by the said complainants respectively, and did omit and refuse to carry such freight for reasonable and just compensation, under the circumstances set forth in said complaints respectively, and especially

with reference to the transportation of freights from Cincinnati and Chicago respectively, to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Birmingham, Ala.; Anniston, Ala.; Selma, Ala., and Meridian, Miss., and territory contiguous thereto. Said complaints prayed, among other things, that said defendants might be required to answer the charges in said complaints, and that after due hearing and investigation, the said defendants be commanded to desist from said alleged violations of said Act, and for such other and further order as said Commission might deem necessary and just in the premises, and that said defendants be required to so adjust their several freight tariffs in the respects so set forth as should effect the relief sought for by said complaints.

Trans., p. 1.

The said defendants were duly notified by said Commission of said complaints, and duly appeared before said Commission and answered the said complaints, denying the truth and justice thereof.

Trans., p. 1.

Such proceedings were thereafter had by, and before said Commission, upon evidence taken, that after full hearing and investigation by said Commission, said Commission, on the 29th day of May, 1894, decided said matter and made its report and opinion in writing upon the subject, stating that it found and declared the charges and exactions complained of were unreasonable and unjust, and should reasonably and justly be reduced to sums named in the order of the Commission, stated and set forth in the Transcript.

Trans., pp. 1-2.

Said Commission "ordered and adjudged that the above named defendants, and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth or sixth class, do, from and after the 10th of July, 1894, wholly cease and desist, and thereafter abstain from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per 100 lbs., for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.;

Atlanta, Ga.; Meridian, Miss.; Birmingham, Ala.; Anniston, Ala., or Selma, Ala., than is below specified in cents per 100 lbs. under said numbered classes respectively, to said points of destination, that is to say:

ON SHIPMENTS OF FREIGHT FROM CINCINNATI—

TO	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Knoxville	53	45	37	27	22	20
Chattanooga	60	54	40	30	24	22
Rome	75	64	54	44	34	30
Atlanta	86	73	60	45	35	27
Meridian	114	98	80	62	49	38
Birmingham	87	74	60	46	36	28
Anniston	86	73	60	45	35	27
Selma	108	92	78	60	48	36

ON SHIPMENTS OF FREIGHT FROM CHICAGO—

TO	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Knoxville	93	79	62	44	37	33
Chattanooga	100	88	65	47	39	34
Rome	114	97	79	61	49	38
Atlanta	126	107	85	62	50	39
Meridian	114	98	82	60	47	38
Birmingham	111	95	72	52	44	34
Anniston	126	107	85	62	50	39
Selma	128	112	89	66	53	38

"And said defendants, and each of them are hereby notified and required to further readjust their tariffs of freights and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago, to Southern points other than those herein above specified, shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order."

Trans., pp. 3–4.

II.

Proceedings in the United States Circuit Court.

Said defendants being advised that said order of the Commission was not lawful, declined to obey the same. Thereupon the Commission filed in the United States Circuit Court of the Southern District of Ohio, Western Division, its petition against said defendants, setting forth the due course of the proceeding hereinbefore stated, and alleging that said defendants had refused to obey the said order of the Commission; whereupon said defendants appeared and made answer to said petition, denying the truth and justice thereof; whereupon evidence was taken and hearing had in the said Circuit Court; and upon said hearing, said Circuit Court made a decree dismissing the petition of said Commission.

Trans., p. 5.

Hon. Geo. R. Sage, U. S. District Judge, delivered a written opinion stating the reason why said petition was dismissed.

Trans., pp. 6–8.

Thereupon said Commission appealed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio.

Trans., p. 5.

III.

Proceedings in The United States Circuit Court of Appeals.

The case being brought on for hearing, the said United States Circuit Court of Appeals certified to this Court as follows:

"It appears that the following question and proposition of law arises concerning which this Court desires the instruction of the Supreme Court of the United States as to its proper decision, viz.: Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth,—all proceedings touching said order being due and regular, so far as procedure is concerned?"

Trans., p. 5.

PART II.

ARGUMENT.

I.

The Scope of the Question Certified to this Court.

It will be noticed that the order of the Commission was based exclusively upon the first section of the Act to Regulate Commerce, which provides that all rates "*shall be reasonable and just*."

The only question in this case therefore is, whether the Interstate Commerce Commission has the power, under the *first section* of the Act, to prescribe or fix reasonable maxima rates; in a case where issue has been joined, testimony has been taken, and a full hearing of the parties has been had before the Commission.

The qustion as to the power of the Commission to prescribe or fix rates under the second, third or fourth sections of the Act is not involved in this case.

II.

The Contention of the Commission.

The contention of the Commission, as stated by itself in Perry vs. Florida Central & Peninsular Railroad Co. (5 I. C. C. Rep., 110) is as follows:

"The Act to Regulate Commerce expressly requires that rates shall be reasonable. The Commission is in terms required to enforce the provisions of the Act. In other words, the Commission's power, and consequently its duty, is to enforce reasonable rates. It is not, of course, contended that the Act confers on the Commission the general power to prescribe the traffic charges of carriers subject to its provisions. The general scope of the Act, as well as its specific provisions as to complaints to and investigations and reports by the Commission, forbids such an interpretation. But where complaint is made to the Commission, or *a specific inquiry is instituted by it, on its own motion*, and it is found after due notice, hearing and investigation that an existing rate is unreasonable, the Commission is not restricted simply to finding that fact, and forbidding the carrier to charge that

ing rate, but it may go further and enforce a reasonable rate; *that is, the Commission may in such case, by clear implication from the language of the law, put in force a reasonable rate.* Before it can do that, it must necessarily determine what the reasonable rate is."

The italics are mine.

See Mr. L. A. Shaver's Brief in No. 563, the Interstate Commerce Commission vs. Alabama Midland Railway Co., et al., p. 106.

The twelfth section of the Act to Regulate Commerce authorizes the Commission "to enquire into the management of the business of all common carriers subject to the provisions of this Act," * * * * and to "keep itself informed as to the manner and method in which the same is conducted."

By the same section the Commission is "authorized and required to execute and enforce the provisions of this Act."

The thirteenth section of the Act provides that any person, firm, corporation, etc., complaining of anything done, or omitted to be done, by any common carrier, subject to the provisions of the Act, in contravention of the provisions thereof, may apply to said Commission by petition; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it is the duty of the Commission to investigate the matters complained of in such manner and by such means as it may deem proper.

"Said Commission shall in like manner investigate any complaint forwarded by the railroad commission or the railroad commissioner of any State or Territory, at the request of such commissioner or commission, *and may institute any inquiry on its own motion in the same manner and to the same effect as though complaints had been made.*"

Under this power to institute an inquiry "on its own motion," the Commission may, if its contention be sound, of its own motion, notify all of the common carriers in the United States who are subject to the provisions of the Act, that at a certain time and place (say at Washington, D. C.), it will proceed to enquire

into the management of the business of each of said carriers; and to ascertain and decide whether the rates now being charged by them, respectively, are "reasonable and just;" and that if, upon such enquiry, it shall find that said rates are not "reasonable and just," it will "put in force" reasonable rates upon all the interstate railroads of this country.

Now, if, upon such notification, said carriers should appear before the Commission, and upon hearing and investigation, the Commission should find that all the existing rail rates in the United States are unreasonable or unjust, the tariff of rates which the Commission might see proper to "put in force," in lieu of the existing rates, would be made *prima facie* evidence in all legal proceedings.

Senator Edmunds, on page 17 of his brief, filed in No.3 56 (Interstate Commerce Commission vs. Alabama Midland Ry. Co., et al.), contends that a proceeding such as is above described, "is not 'fixing rates' in the sense that State Commissioners of Railways are authorized by their Legislatures to establish general rates for all classes and for all railways:" and he says that the Commission makes no such claim. If the Commission can fix reasonable rates for one railway, I see no reason why it may not fix them for all railways that are subject to the Act.

In this case there were thirty-four railway companies and steamship companies defendants. And in the Alabama Midland case there were forty-seven railway companies and steamship companies, defendants.

In this case, the Commission undertook to fix rates on the hundreds or thousands of articles embraced in the six numbered classes, from Chicago and Cincinnati respectively, to Knoxville, Chattanooga, Rome, Atlanta, Meridian, Birmingham, Anniston, and Selma, respectively; eight of the most important distributing points in the South.

If the Commission had the power to fix rates for the number of carriers that were made defendants in this case, and in the other case referred to above, and upon the vast number of articles upon which rates were fixed in this case, it seems to me that it would necessarily have the power to fix rates upon all classes of freight, and between all points, and for all carriers in the United States that are subject to the Act.

As to the distinction sought to be drawn between the action of the Interstate Commerce Commission, and the action of State Commissioners, in fixing rates, based upon the fact that the Interstate Commerce Commission proceeds only "after due notice, hearing and investigation;" all that the Interstate Commerce Commission will have to do, in order to exercise all the rate making powers possessed by State Commissioners, is to notify the carriers of its intention to do so.

III.

The Powers of State Railroad Commissions.

The following synopsis of the powers of State Railroad Commissions in the various States mentioned below is taken from the Fourth Annual Report of the Interstate Commerce Commission, and has been assumed by me to be correct:

In Alabama, a "Board of three Railroad Commissioners are empowered *to revise tariffs* from time to time, and if too high, or unjustly discriminative, to notify companies of changes required; to approve tariffs when satisfactory, and *to increase or reduce rates*, as experience may show to be just."

See 4th An. Rep. I. C. C. (1890), p. 243.

In Arkansas, "the Governor, Secretary of State, and Auditor of Public Accounts constitute the Board of Railroad Commissioners, and may *reduce rates* when profits exceed a prescribed limit."

4th An. Rep. I. C. C. (1890), p. 244.

In California, a "Commission of three members is empowered *to establish, alter and publish transportation charges*, and to hear and determine complaints."

See 4th An. Rep. I. C. C. (1890), p. 244.

In Florida, a "Board of three Commissioners is empowered *to make, revise, and alter tariffs of railway charges*," etc.

See 4th An. Rep. I. C. C. (1890, p. 246.

In Georgia, a "Board of three Commissioners is empowered *to make, revise and alter tariffs of railway charges.*"

4th An. Rep. I. C. C. (1890), p. 246.

In Iowa, a "Board of Railroad Commissioners is authorized to hear and decide complaints subject to revision of regular courts, and *to make, revise and alter schedules of maximum charges.*"

4th An. Rep. I. C. C. (1890), p. 247.

In Illinois, a "Board of three Commissioners is empowered *to make, revise, and alter transportation charges,*" etc.

4th An. Rep. I. C. C. (1890), p. 249.

In Kansas, a "Board of three Commissioners is authorized to investigate complaints *and the rates fixed by the Board shall be accepted by the companies.*"

4th An. Rep. I. C. C. (1890), p. 250.

In Maine, a "Board of three Commissioners may, on complaint, and after notice, *revise and alter tariffs of charges* for one year."

4th An. Rep. I. C. C. (1890), p. 252.

In Minnesota, a "Board of three Railroad Commissioners is empowered to require companies *to make changes in tariffs*, and if they refuse, *to make tariffs for them,*" etc.

4th An. Rep. I. C. C. (1890), p. 253.

In Mississippi, a "Board of three Commissioners is empowered *to revise, alter and approve the tariffs* of the railroad companies, to supervise the same, and *increase or reduce charges* from time to time, as experience may show to be just."

4th An. Rep. I. C. C. (1890), p. 254.

In North Dakota, a "Board of three Railroad Commissioners is empowered *to alter tariffs,*" etc.

4th An. Rep. I. C. C. (1890), p. 258.

In South Carolina, a "Board of three Railroad Commissioners is authorized *to make and alter tariffs of freight charges,*" etc.

4th An. Rep. I. C. C. (1890), p. 262.

It will be noticed that the Act to Regulate Commerce does not confer upon the Interstate Commerce Commission the power "to revise tariffs;" nor "to fix rates;" nor "to increase or reduce rates;" nor "to establish or alter transportation charges;" nor "to make, revise or alter tariffs of railway charges;" nor "to make, revise or alter schedules of maximum charges;" nor "to

correct charges;" nor "to make changes in tariffs;" nor "to revise, alter or approve tariffs;" nor "to increase or reduce charges:" nor "to make or alter tariffs of freight charges."

If Congress had intended to confer upon the Interstate Commerce Commission the power to make rates, the statutes of the states above referred to would have furnished precedents, and some such provisions as are quoted above would have been found in the Act to Regulate Commerce.

While the Interstate Commerce Commission concedes that it has no such power as the State Railroad Commissions above referred to, "to fix rates" without "due notice, hearing and investigation," yet the effect of its contention is that by going through the form of "due notice, hearing and investigation" it can, "by clear implication," exercise over all the interstate railways of this country precisely the same power as is exercised by the State Railroad Commissions above referred to.

In the States referred to below, the railroad commissions are not authorized to fix rates:

In Massachusetts, a "Board of three Commissioners is authorized to supervise railroads and see that they conform to the law, to investigate complaints, and make reports and recommendations thereon."

4th An. Rep. I. C. C. (1890), p. 251.

In Kentucky, a "Board of three Railroad Commissioners is authorized to supervise the companies in matters pertaining to their duties to the public, and to hear and determine complaints subject to the revision of the regular Court."

4th An. Rep. I. C. C. (1890), p. 251.

In Missouri, a "Board of Railroad Commissioners is authorized to see that schedules of rates are fair and just, to hear and determine complaints, subject to revision by the Court, and to see that the provisions of the Act are enforced."

4th An. Rep. I. C. C. (1890), p. 254.

In Nebraska, a "Board composed of high State officials and secretaries is empowered to supervise the business of the companies, and to hear and decide complaints subject to revision by the regular Court."

4th An. Rep. I. C. C. (1890), p. 255.

In New Hampshire, a "Board of three Commissioners is charged with supervision of railroads, seeing that they comply with the law, making investigations, and reporting thereon."

4th An. Rep. I. C. C. (1890), p. 256.

In New York, a "Board of three Commissioners has general supervision of railroads and their operation with reference to public safety and conveniences, and it is empowered to investigate and report on violations of law."

4th An. Rep. I. C. C. (1890), p. 257.

In Oregon, a "Board of three Commissioners has power to supervise the business of the railroads as the same affects the public convenience and safety, and to hear and decide complaints, subject to the revision of the Court."

4th An. Rep. I. C. C. (1890), p. 260.

In South Dakota, a "Board of three Commissioners is empowered to see that the law is complied with, and to prosecute companies for violation thereof, either *suo motu* or on complaint."

4th An. Rep. I. C. C. (1890), p. 262.

In Virginia, "there is one Railroad Commissioner who is required to see that the companies comply with the law, to notify them of violations of law, and, if same are continued, to report to Board of Public Works, who may direct the Commissioner to apply for an injunction to restrain such violations."

4th An. Rep. I. C. C. (1890), p. 264.

In Vermont, a "Board of three Commissioners is to have general supervision of the railroads and to report violations of law to the Legislature, to investigate failure to make connections or furnish accommodation, and to make public their conclusions, and make recommendations in respect thereto, which may be enforced by the Court."

4th An. Rep. I. C. C. (1890), p. 265.

In Wisconsin, "one Railroad Commissioner is to have supervision of railroads, and to hear and decide complaints, subject to revision by the Courts."

4th An. Rep. I. C. C. (1890), p. 266.

Congress, instead of giving the Interstate Commerce Commission power to *make rates*, as was conferred upon State Commissions

in Alabama, Arkansas, California, Florida, Georgia, Iowa, Illinois, Kansas, Maine, Minnesota, Mississippi, North Dakota, and South Carolina, conferred upon the Interstate Commerce Commission only the power to supervise the railroads, to see that they conform to the law, to investigate complaints, and make reports and recommendations thereon, subject to the revision of the Courts; thus following the precedents furnished by the statutes of Massachusetts, Kentucky, Missouri, Nebraska, New Hampshire, New York, Oregon, South Dakota, Virginia, Vermont, and Wisconsin.

IV.

The Interstate Commerce Commission's First Construction of its Power to Fix Rates.

In one of the earliest cases decided by the Commission, in answer to an application to compel a certain reduction in rates, it was said by Judge Schoonmaker: "It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, *which it has not.* Its power in respect to rates is to determine *whether those which the roads impose are for any reason in conflict with the statute.*"

1 I. C. C. Rep., pp. 155, 156, Thatcher vs. D. & H. C. Co. et al.

In the case in which Judge Schoonmaker used the language just quoted there was "due notice, hearing and investigation;" and yet it had evidently not occurred to the Commission at that early day, that "by clear implication," or in any other way, it possessed the power to make rates "generally."

If making rates from Chicago and Cincinnati respectively, two of the most important commercial points in Central Territory, to Knoxville, Chattanooga, Rome, Atlanta, Meridian, Birmingham, Anniston and Selma, eight of the most important commercial points in Southern Territory; and if making those rates on all of the articles embraced in the six numbered classes; and if making those rates for thirty-four interstate carriers, is not making rates "generally," I am at a loss to know what would be.

V.

The Functions of the Interstate Commerce Commission.

One of the first cases arising under the Act to Regulate Commerce was the Kentucky & Indiana Bridge Company vs. Louisville & Nashville Railroad Company, which was commenced before the Commission Feb. 10th, 1888, and decided Jan. 7, 1889, by Judge, afterwards Justice Jackson.

So far from ascribing to the Commission rate-making powers, he said: "The functions of the Commission are those of Referees or Special Commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to Interstate Commerce matters covered by the law, the Commission may be regarded as the general Referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the Act."

37 Fed. Rep., p. 613, K. & I. Bridge Co. vs. L. & N. R. R. Co.

It has never been supposed that Referees of the Circuit Courts of the United States have either expressly, or "by clear implication," been vested with power to prescribe rates for common carriers.

The Circuit Courts of the United States, in suits for overcharges, have always had jurisdiction to ascertain whether a particular rate or charge was reasonable or not; and as such questions frequently depend upon numerous and complicated facts, those Courts have always possessed the power to refer such questions of fact to Referees. But the mere fact that a Referee was authorized to investigate and report to the Court whether a particular rate was reasonable or not was never supposed to confer either upon the Referee, or upon the Court, the power to prescribe, or fix reasonable rates to be charged in the future.

VI.

Congress Did Not Intend to Deprive Carriers of the Right to Make Rates.

In the case last cited, Judge Jackson, in discussing the power of Congress to regulate railway rates, said: "Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate in respect thereto to the same extent, both as to rates and all other matters of regulation, as the States may do in respect to purely local or internal commerce. But we are not called upon in the present case to say what would or would not come within this regulating power, for the existing law *does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just.*"

The italics are mine.

37 Fed. Rep., p. 634, K. & I. Bridge Co. vs. L. & N. R. R. Co.

In the Social Circle case, this Court said that "subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free" . . . "*to adjust and apportion their rates* so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

162 U. S., p. 197, C., N. O. & T. P. Ry. vs. I. C. C.

43 Fed. Rep., p. 53, I. C. C. vs. B. & O. R. R.

73 Fed. Rep., p. 426, I. C. C. vs. L. & N. R. R. Co.

74 Fed. Rep., pp. 787, 788, I. C. C. vs. Lehigh Valley R. R. Co.

74 Fed. Rep., p. 722, I. C. C. vs. Alabama Midland Ry. Co. et al.

Law Rep., 1 Q. B. (1896), pp. 264, 265, Rickett, Smith & Co. vs. Midland Ry. Co.

VII.

The Social Circle Case.

In that case there was "due notice, hearing and investigation" before the Commission. There were two grounds of complaint.

First: That a higher rate was charged from Cincinnati to Social Circle than to Augusta, a farther distant point.

Second: That the rate on first-class freight from Cincinnati to Atlanta was not reasonable and just.

The Commission decided both points against the railroads.

Additional testimony was taken in the U. S. Circuit Court; and that Court decided both points in favor of the railroads.

The Commission took the case to the U. S. Circuit Court of Appeals, and that Court decided the question as to the rate to Social Circle against the railroads; and the question as to the rates to Atlanta it decided in their favor.

The railway companies appealed from so much of the decree of the Court of Appeals as decided against them the question as to the rate to Social Circle. Their appeal was taken June 7, 1894.

See Trans., p. 394, in case of Cincinnati, New Orleans & Texas Pacific Ry., et al., Appellants, vs. Interstate Commerce Commission, No. 729, October Term, 1894.

About four months thereafter, viz., on Oct. 2, 1894, the Attorney General of the United States gave to the counsel for the Interstate Commerce Commission, in said cause, the following directions: "Said Railway Companies, Appellants, having appealed said cause from the Circuit Court of Appeals for the Fifth Circuit, to the Supreme Court of the United States, and it being desirable that certain questions not made by the Appellants shall be passed upon by the Supreme Court, you are hereby directed to file a cross appeal to the United States Supreme Court in said cause."

See Trans., pp. 2–3, in the case of the Interstate Commerce Commission, Appellant, vs. Cincinnati, New Orleans & Texas Pacific Railway Co., et al., No. 832, October Term, 1894.

The "questions not made by the Appellant," referred to by the Attorney General, are shown in the assignment of error filed with the cross appeal, which was as follows:

i. "That said Circuit Court of Appeals erred in not holding that in point of law the said Interstate Commerce Commission had power to fix the maximum rate which it did fix, as shown by the record.

ii. "That said Circuit Court of Appeals erred in not holding that the evidence justified the rate fixed by said Interstate Commerce Commission, and in not decreeing accordingly.

iii. "That said Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court on the subject of the rate so fixed, and in not sustaining the judgment and order of said Interstate Commerce Commission, with respect to said rates."

See page 1, of Trans., last cited.

This Court, in speaking of the cross appeal by the Interstate Commerce Commission, said:

"That appeal presents the question whether the Circuit Court of Appeals erred in its holding in respect to the action of the Interstate Commerce Commission in fixing a maximum rate of charges for the transportation of freight of the first-class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as two-fold, and is so presented in the assignment of error filed on behalf of the Commission, namely: Did the Court err in not holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate, and, if such power existed, did the Court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?"

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

The Court considered the question of fact first, and said that as both the Circuit Court and the Court of Appeals found the existing rates to have been reasonable, this Court did not feel disposed to review their finding on that matter of fact.

162 U. S., p. 196.

The Court then proceeded to consider the question of law, and said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates, was mooted in the Courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the Act that expressly, or by necessary implication, confers such a power.

"It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the functions of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made, and the facts found, itself fixes a rate, that rate is prejudiced by the Commission to be reasonable.

"We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of the Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., 43 Fed. Rep., 37, and whose judgment was affirmed by this Court (145 U. S., 263):

"'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, *to adjust and apportion their rates* so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

The italics are mine.

162 U. S., 196–7, C., N. O. & T. P. Ry. vs. I. C. C.

VIII.

Senator Edmunds, on page 19 of his brief, filed at the present term, in the case of The Interstate Commerce Commission, Appellant, vs. The Alabama Midland Railway Company et al., No. 563, Oct. Term, 1896, says:

"If the Supreme Court had been of the opinion that the action of the Commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power, they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirmed the judgment of the Circuit Court and Court of Appeals upon the express ground that the Commission was in error in its finding of fact."

I do not understand that this Court affirmed the judment of the Circuit Court of Appeals "upon the express ground that the Commission was in error in its finding of fact."

On the contrary, I understand the Court affirmed the decree of the Circuit Court of Appeals as well upon the question of law that the Interstate Commerce Commission had no power to fix a maximum rate, as upon the question of fact that the evidence did not justify the rate fixed by the Commission.

The Court expressly stated that both of those questions were presented in the assignment of error filed on behalf of the Commission, and both of those questions were discussed and decided by the Court.

While a decision of either of them against the Commission would have been sufficient to affirm the decree of the Court of Appeals, yet, as the Court did in fact decide both of the questions, its decision is authority upon both of them.

As the manifest object of the Attorney General was to settle the question as to the power of the Commission to fix rates, and as the cross appeal distinctly raised that question, it was eminently proper for this Court to dispose of it.

IX.

Mr. L. Shaver, of counsel for the Commission, on page 90 of his brief, filed at the present term, in the case of The Interstate Commerce Commission, Appellant, vs. The Alabama Midland Railway Company, No. 563, lays great stress upon the word "*itself*," as used by the Court in the phrase, the "power to *itself* fix rates;" and he argues that the use of that word indicates that the Court did not intend to deny to the Commission the power to prescribe a reasonable rate, except in a case where no issue had been made, and the facts had not been found.

In the Social Circle case, an issue had been made before the Commission; the facts had been found by the Commission; and it was with reference to such a case, that the Court decided that the Commission had no power "to itself fix rates."

To attribute to the language of the Court the meaning contended for by Mr. Shaver, would place the Court in the attitude of failing to decide the question that was before it, and of deciding a different question that was not before it.

The use of the pronoun, "itself," was merely a somewhat more emphatic mode of expression. To say that the Commission "itself" has no power to fix rates, means no more, in substance, than to say, simply, that "the Commission has no such power."

The Court said: "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates, was mooted in the Courts below, and is discussed in the briefs of counsel."

162 U. S., 196.

Certainly the question was neither mooted in the Courts below, nor discussed in the briefs of counsel, as to the power of the Commission to fix rates in a case where no issue had been made, and no facts had been found. On the contrary, the question mooted in the Courts below and discussed in the briefs of counsel, was whether the Commission had the power to itself fix rates in the case then before the Court; a case in which an issue had been made before the Commission, and the facts had been found by the Commission.

X.

Mr. Shaver, on page 90 of said brief, lays great stress on the word "prejudged" as used by the Court.

The sentence in the opinion, referred to by Mr. Shaver, is as follows: "If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."

Mr. Shaver contends that the word "prejudged" as used in that sentence, means judgment in advance of a hearing upon a full presentation of issues and of all material facts.

But to give to the word "prejudged" the meaning claimed by Mr. Shaver, would be to assume that this Court decided a question that was not before it; because, the only question before the Court was whether the Commission had the power to fix the rate *involved in that case;* a case in which there had been a hearing before the Commission upon a full presentation of issues, and of such facts as the Commission deemed sufficient to justify it in fixing the rate in controversy in that case.

Considering the exact question that was before the Court in that case, it seems to me that by the word "prejudged" the Court meant that to prescribe a rate to be charged in the future, is to "prejudge" a matter upon which no issue can now be made, and as to which the facts cannot now be found.

The Court said: "It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight."

162 U. S., 196.

The power "to pass upon the reasonableness of existing rates" is a judicial, or quasi judicial power; whereas the power to "prescribe" rates to be charged in the future, is a legislative power.

The reasonableness of an existing rate in a given case depends on existing facts, and the Commission has the power to pass upon those facts; but the reasonableness of a rate to be prescribed for the future depends on facts as they may exist in the future, upon which no issue can now be made, and as to which no testimony can now be taken. When, therefore, the Commission now attempts to prescribe a future rate, it acts in advance of the making of an issue; it acts in advance of a finding of the facts; and it necessarily "prejudges" that the rate so prescribed will be reasonable. Such a power may be exercised by the legislative department, but it cannot be exercised by a judicial or quasi judicial tribunal.

XI.

Mr. Shaver, on page 92 of said brief, says:

"The fixing of a rate on a partial finding of facts, without the consideration of other material facts, would be to that extent *prejudging* the reasonableness of the rate, and would not meet the requirement that 'the facts' be found."

To pass judgment "on a partial finding of facts" without the consideration of other material existing facts, may constitute an erroneous judgment, but it does not constitute a "prejudgment;" for, as defined by Mr. Shaver, on page 90, of said brief, "prejudgment is judgment *pre-* before or in advance." To pass judgment in advance of an issue, and in advance of a finding of fact, is prejudgment; but to pass judgment upon insufficient facts, in a case where issue has been joined, is merely an erroneous judgment. This Court would not have used the word "prejudged" in the sense of a judgment which is merely erroneous.

XII.

One of the orders made by the Commission in the Social Circle case, directed the defendants "to cease and desist from making any greater charge in the aggregate on buggies, carriages, and other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta."

Mr. Shaver, on pages 98–99, of said brief, contends that said order in effect prescribes a maximum rate from Cincinnati to Social Circle; because it directs that it shall not exceed the rate to Augusta.

The particular form of said order was not discussed by counsel, nor considered by the Court. The only question in controversy under that order was whether the transportation to Social Circle was conducted under substantially similar circumstances and conditions as the transportation to Augusta. The Court held that to be a question of fact, and as the Court of Appeals had approved the finding of the Commission upon that question of fact, this Court declined to reverse.

It will be seen, however, that said order does not fix any rate either to Social Circle or to Augusta; and that it leaves the defendants free "to adjust and apportion their rates so as to meet the necessities of commerce," subject only to the condition that on first-class freight the rate to Social Circle shall not be higher than the rate to Augusta.

XIII.

In the "Import Case" the following language is used in the opinion of the Court:

"We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission or by the courts below in respect to what were proper rates to be charged by the Texas & Pacific Railway Company. That was a question of fact, and if the inquiry had been conducted on a proper basis we should not have felt inclined to review conclusions so reached."

162 U. S., 235, T. & P. Ry. vs. I. C. C.

Mr. Shaver, on page 96 of said brief, relies upon the language just quoted as an express recognition by this Court of power in the Commission to fix rates.

The question as to the power of the Commission to fix or prescribe future rates was neither discussed by counsel, nor considered by the Court in the "Import Case."

XIV.

In every case at circuit in which the question has arisen since the decision of this Court in the Social Circle case, said decision has been construed as denying to the Commission the power to fix rates.

73 Fed. Rep., 429, I. C. C. vs. L. & N. R. R.
74 Fed. Rep., 787–8, I. C. C. vs. L. V. R. R.
74 Fed. Rep., 72–3, I. C. C. vs. N. E. R. R.
74 Fed. Rep., 722, I. C. C. vs. Ala. Mid. Ry.
76 Fed. Rep., 184, I. C. C. vs. C., N. O. & T. P. Ry.

XV.

ARGUMENTS BASED ON IMPLICATION.

I.

That the Act to Regulate Commerce is Highly Remedial.

Senator Edmunds, on pages 1 and 2 of his brief, filed at the present term, in the case of the Interstate Commerce Commission, Appellant, vs. The Alabama Midland Railway Company, et al., No. 563, October Term, 1896, contends that the Act to Regulate Commerce is in all its civil aspects "in the very highest sense and to the last degree remedial;" and that being thus remedial, the statute "ought to be construed liberally to the attainment of the ends in view."

It is true that a remedial statute ought to be construed liberally "to the attainment of the ends in view," but the question in this case is what were "the ends in view," the attainment of which was sought by the passage of that Act.

In the case of the I. C. C. vs. B. & O. R. R., Mr. Justice Brown said:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as The Interstate Commerce Act, 24 Stat., 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service," . . "though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

Speaking of the evils which the Act was intended to remedy, he said:

"These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of

the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line."

Speaking of the objects to secure which the Act was passed, he said:

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

145 U. S., pp. 275, 276, I. C. C. vs. B. & O. R. R.

In the case of U. P. Ry. vs. Goodridge, Mr. Justice Brown, in speaking of an Act of the Legislature of Colorado, said:

"The statute is of the same nature as the Interstate Commerce Act, and like that was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property."

149 U. S., p. 687, U. P. Ry. vs. Goodridge.

It will be noticed that neither in his statement of the defects in the common law which the Act was intended to remedy; nor in his statement of the evils for which the common law did not provide; nor in his statement of the objects which the Act was intended to secure, was any mention made by Mr. Justice Brown of the power to fix rates for carriers engaged in interstate commerce; nor does he intimate that the vesting of such a power in the Interstate Commerce Commission was at all necessary in order to remedy any of the evils, or to secure any of the objects referred to by him.

On the contrary, it was said by this Court in the Social Circle case, that subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act leaves common carriers as they were at the common law, free "to

classify their traffic, *to adjust and apportion their rates* so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

162 U. S., 197, C., N. O. & T. P. Ry. vs. I. C. C.

It is one thing to construe liberally the objects and remedies, to secure which the Act was passed; and it is quite a different thing to add to the Act, by mere implication, the power to fix rates, when no such power or remedy was provided by the Act.

If it had been the intention of Congress to provide as one of the remedies furnished by the Act, the power to fix rates, it would have been quite easy to have followed the precedents contained in the statutes of those States, which have expressly conferred upon their commissions rate-making powers; and the fact that Congress did not follow that line of precedence, is a powerful argument why the Court should not, by implication, confer rate-making power upon the Interstate Commerce Commission.

II.

That the Commission is Authorized to Execute and Enforce the Act.

Senator Edmunds, on page 10 of said brief, refers to the fact that the Commission is authorized and required to execute and enforce the provisions of the Act.

The Act confers upon the Commission various powers, and imposes upon it various duties. The Act specifies how those powers are to be exercised, and how those duties are to be performed. But in authorizing the Commission to execute and enforce the provisions of the Act, Congress meant no more than that the Commission should execute and enforce it in the manner therein specified. Congress did not expect the Courts to confer, by implication, the rate-making power, as a new and additional mode of execution.

Article II., Sec. 3, of the Constitution of the United States, ordains that the President "shall take care that the laws be faithfully executed." The Act to Regulate Commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce.

III.

That the Act Requires that Rates Shall be Reasonable and Just.

Senator Edmunds, on page 9 of said brief, refers to the fact that the first section requires that "all charges shall be reasonable and just."

The common law required that charges for transportation should be reasonable.

145 U. S., 275, I. C. C. vs. B. & O. R. R.

The first section therefore, simply enacted the common law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the Courts "to execute and enforce" the common law requirement that "all charges shall be reasonable and just;" and yet it has never been claimed that the Courts, by implication, possessed the power to make rates for carriers.

IV.

It may be argued that the power to determine that a certain rate is unreasonable, necessarily includes the power to determine what rate is reasonable.

If a carrier should sue to recover freight due to it, or if a shipper should sue a carrier for an overcharge, the question in either case would be what is a reasonable rate; and, of course, the Court would have the power to determine that question. But the effect of such determination would not be to prescribe the rate so found to be reasonable, as the rate to be charged by the carrier in the future; nor would the Court undertake, as an incident of its judgment in that case, to order the carrier to charge such rate in the future.

Suits of that kind have been common in the Courts for hundreds of years; but no one has ever claimed that the power to entertain such suits by the Courts, conferred upon them, by implication, the power to fix rates.

The question of the reasonableness of an existing rate is eminently one for judicial investigation, requiring due process of law for its determination.

134 U. S., p. 458, Chicago, etc., Ry. Co. vs. Minnesota.

But the power to fix rates to be charged in the future is a legislative power.

94 U. S., 133, Munn vs. Illinois.
94 U. S., 178, Peik vs. Chicago, etc., Ry. Co.
117 U. S., 29, Express Cases.

The power conferred upon the Interstate Commerce Commission is the quasi judicial "power to pass upon the reasonableness of existing rates."

162 U. S., 196, C., N. O. & T. P. Ry. Co. vs. I. C. C.

But it cannot be implied from that quasi judicial power that the Commission has the quasi legislative power "to prescribe rates to be charged in the future."

162 U. S., 196, C., N. O. & T. P. Ry. vs. I. C. C.

As said by this Court in the Import case, "Congress has not seen fit to grant legislative powers to the Commission."

162 U. S., 216, T. & P. Ry. vs. I. C. C.

In the Reagan case, this Court enjoined the Texas Commission from enforcing certain rates established by that Commission. The fourth headnote in that case is as follows:

"It is within the power of a Court of Equity in such case to decree that the rates so established by the Commission are unreasonable and unjust, and to restrain their enforcement; but it is not within its power to establish rates itself, or to restrain the Commission from again establishing rates."

154 U. S., 362, Reagan vs. Farmers' Loan & Trust Co.

In determining that the rates established by the Texas Commission were unreasonably low, the Court doubtless arrived at some conclusion as to what rates would be reasonably high, but the Court restricted its action to the performance of its judicial duty, by passing only upon the reasonableness of the existing rates; and it declined to usurp the legislative power to fix reasonable rates to be charged in the future.

See also St. L. & San. F. Ry vs. Gill, 156 U. S., p. 663.

So the Interstate Commerce Commission, in determining that a certain rate charged by a railway company is unreasonably high, doubtless arrives at some conclusion as to what rate would be reasonably low; but the Commission should restrict its action, as this Court did in the Reagan case, to the performance of its judicial duty, by passing only upon the reasonableness of the existing rate, without attempting to usurp the legislative power to fix a reasonable rate to be charged in the future; and without attempting to restrain the railway company from again establishing its own rates.

V.

That the Power to Recommend Reparation Involves the Power to Prescribe Future Rates.

Section 14 of the Act provides "that whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured."

It was contended in the Social Circle case, and will doubtless be again contended in this case, that the power to recommend what reparation shall be made to a certain party in a given case, includes the power to prescribe what rates shall be charged in the future.

In suits for overcharges, which have been cognizable by the courts for hundreds of years, it has always been competent for the Court, where the facts are numerous and complicated, to refer the case to a master "to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the master are based, together with his recommendation as to what reparation, if any, should be made by the common carrier to any party or parties to the suit who may be found to have been injured;" but such a reference to a master in equity has never been supposed to confer upon him the power to fix rates to be charged by such carrier in the future.

The word "reparation" ordinarily refers to repairing a wrong that has been done in the past, and not to prescribing a rule of

conduct to be pursued in the future. Under the 14th Section, the reparation therein mentioned is to be made to the party who may be found "to *have been* injured;" and it evidently refers to an injury that has been done in the past.

VI.

That the Power to Enforce the Provision Against Unjust Discrimination, Involves the Power to Prescribe Future Rates.

Senator Edmunds, on page 11 of his brief, above referred to, asks "is the power of the Commission exhausted in saying to the discriminating carrier, 'you shall not discriminate,' and stop there? Must it not say, if it does its duty in enforcing the Act and redressing the grievances found to exist, that it will enforce the law by deciding what the nature and degree of the discrimination is, and by requiring that such degree of discrimination shall be effaced altogether by affirmative conduct of equality, or by a charge of no more than the ascertained rightful sum, to the parties aggrieved?"

The power of the Commission, in regard to discrimination, is the same as it is in regard to other alleged violations of the Act. It is limited to making a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, "together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured," by such discrimination. The function of the Commission is confined to passing upon Acts which have been done in the past, and does not extend to prescribing future rates.

The case of the Union Pacific Railway Company vs. Goodridge (149 U. S., p. 680), was an action to recover triple damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal. That statute is of the same nature as the Interstate Commerce Act. The Court in that case might have referred it to a Master or Commissioner to make a report like that which the Interstate Commerce Commission is authorized to make, but such a reference would not have conferred upon the Master or Commissioner any power to prescribe future

rates to be charged by the railway company that was the defendant in that case.

Senator Edmunds, on page 12 of said brief, insists that unless the carrier can be compelled by injunction to put in force such rates as the Commission may think are reasonable, and non-discriminatory, the carrier can and will make reductions only at the rate say of one cent at a time, and thus delay indefinitely the adoption of such rates as may be prescribed by the Commission.

Such an argument assumes that there is no government worth having, except a government by injunction. Courts of common law, under the English system, have been fully as effective as courts of equity in executing and enforcing the law. Even in courts of equity, the writ of injunction is regarded as an extraordinary process; and one which is not to be resorted to, except where no other remedy will avail.

The Act to Regulate Commerce subjects carriers, not only to liability for damages and costs, but also to the payment of their opponent's attorneys' fees, in cases where they are found guilty of violating the Act.

Congress was doubtless aware that the imposition of such a liability upon carriers would be sufficient to ensure prompt and full obedience to the Act, without conferring upon the Commission an injunctive power that would enable it to make future rates for all the interstate railways in this country.

VII.

The Argument that the Power to Report Whether an Undue Preference Exists, Involves the Power to Prescribe Future Rates.

The power of the Commission in cases of alleged undue preference, is the same as in cases of alleged unjust discrimination.

The functions of the Commission are limited to making a report in writing, in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or

parties who may be found to have been injured by such undue prepreference.

I have already attempted to show that the power to recommend what reparation should be made for an injury done in the past, does not involve the power to prescribe rates to be charged in future.

VIII.

The Argument that the Power to Notify Carriers to Desist From Omitting to Perform Some Duty, Involves the Power to Prescribe Future Rates.

Section 15 provides that if, upon an investigation, it shall be made to appear to the Commission that anything has been done, or *omitted to be done* in violation of the Act, it shall be the duty of the Commission to notify such common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both.

The argument is that where a carrier omits to charge reasonable rates, or non-discriminatory rates, or non-preferential rates, it omits to do that which the Act requires it to do; and that the Commission being authorized to notify the carrier to cease and desist from such acts of omission may issue what is, in effect, a mandatory injunction, requiring the carrier to charge such future rates as the Commission may deem to be reasonable, non-discriminatory, and non-preferential.

This argument, while ingenious, assumes that Congress could not have contemplated any acts of omission by a carrier except such as relate to its rates; but there are many acts of omission contemplated by the statute, which have no direct reference to the carriers' rates. Among illustrations that might be given, are the following: A carrier may omit to print or file its tariffs; or it may omit to file its tariffs in the form prescribed by the Commission; or it may omit to file certain traffic contracts which the Act requires to be filed; or it may omit to file its annual reports with the Commission; or it may omit to keep its accounts in the form ordered by the Commission; or it may omit to afford proper facilities for the interchange of traffic, etc. Such acts of omission furnish ample scope for the exercise of such injunctive power as is conferred upon the Commission, without implying the further power in the Commission to make rates for all of the interstate railways in this country.

IX.

The Argument that the Denial of Power to the Commission to Prescribe Future Rates, will Nullify the Remedies Provided by the Act.

The principal objects of the Interstate Commerce Act, as stated by Mr. Justice Brown, in the case of the Interstate Commerce Commission vs. the B. & O. R. R., were as follows:

1st. "To secure just and reasonable charges for transportation."

2nd. "To prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions."

3rd. "To prevent undue or unreasonable preferences to persons, corporations or localities."

4th. "To inhibit greater compensation for a shorter than for a longer distance over the same line," under similar circumstances and conditions.

5th. "To abolish combinations for the pooling of freights."
145 U. S., p. 276, I. C. C. vs. B. & O. R. R.

In addition to the above, mentioned by Mr. Justice Brown, are the following objects:

6th. To require the printing, posting and filing of tariffs.

7th. To prohibit the advance or reduction of rates without notice.

8th. To require that rates shall be charged as published.

9th. "To prevent interference with the continuity of shipments."

All of the above mentioned objects and remedies can, and will be fully preserved, and enforced, without conferring upon the Interstate Commerce Commission, by implication, the additional power to make rates for all the interstate railways in this country.

X.

The Argument that the Denial of the Power to the Commission to Prescribe Future Rates will Deprive the Commission of all Useful Power.

The following very useful and important powers will remain to the Commission:

1st. To inquire into the business of all interstate carriers.

2nd. To require annual reports from all of the carriers, showing the financial and physical conditian of their property.

3rd. To make annual reports to Congress, showing the condition of the railway system of the country, and advising such further legislation in regard thereto, as may be deemed necessary.

4th. To prescribe the forms of all tariffs of rates to be used by the various carriers in this country.

5th. To receive, retain and furnish copies of all tariffs and of all traffic contracts.

6th. To investigate, and report the facts in all cases of supposed violation of the law.

7th. To prosecute in court all claims for alleged violations of the law.

8th. And generally, to execute and enforce the law, in the mode and by the means therein prescribed.

The faithful and intelligent performance by the Commission of the above mentioned duties, will require all of the time at its command; and it would simply impair its efficiency to impose upon it, by implication, the further duty to make rates for all of the interstate railways in this country.

It is one thing for the Commission to investigate and report upon such complaints as may be made from time to time, with reference to the reasonableness of existing rates. In fact, the number of such complaints is astonishingly small.

There are but eighteen cases reported in the 9th volume of the English Railway & Canal Traffic Cases, and that volume covers a period from November 27th, 1894, to April 1st, 1896. It contains all of the cases that were supposed to be of sufficient importance to deserve a written opinion by the English Commission.

But when it shall be attempted by our Commission to make cases for all of the interstate railways in this country, it will be found to involve an amount of labor which, if not utterly beyond the power to perform, will prevent it from performing any of the more important duties mentioned above, and which duties have been, by express language, imposed upon the Commission.

Respectfully submitted,

ED BAXTER,
of Counsel for Appellees.

Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK

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167-479

IN THE

Supreme Court of the United States.

October Term, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Supplement to Argument of ED. BAXTER,
Of Counsel for Appellees, as of record.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *et al.*

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Supplement to Argument of Ed. Baxter, of Counsel for Appellees, as of Record.

On the 6th day of January, 1886, John H. Reagan, a Representative from the State of Texas, introduced in the House of Representatives a bill, H. R. 2412, to regulate interstate commerce, and to prevent unjust discriminations by common carriers. This bill was read twice, referred to the Committee on Commerce, and ordered to be printed.—*Cong. Record, vol. 17, p. 486.*

This bill was in the following words:

H. R. 2412.

A BILL

To regulate Inter-State commerce and to prevent unjust discriminations by common carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person or persons engaged alone or associated with others in the transportation of property by railroad from one State or Territory to or through one or more other States or Territories of the United States, or to or from any foreign country, directly or indirectly to charge to or receive from any person or persons any greater or less rate or amount of freight, compensation, or reward than is charged to or received from any person or persons for like and contemporaneous service in the carrying, receiving, delivering, storing, or handling of the same. All charges for such services shall be reasonable. And all persons engaged as aforesaid shall furnish, without discrimination, the same facilities for the carriage, receiving, delivery, storage, and handling of all property of like character carried by him or them, and shall perform with equal expedition the same kind of services connected with the contemporaneous transportation thereof as aforesaid. No break, stoppage, or interruption, nor any contract, agreement, or understanding, shall be made to prevent the carriage of any property from being and being treated as one continuous carriage, in the meaning of this act, from the place of shipment to the place of destination, unless such stoppage, interruption, contract, arrangement, or understanding was made in good faith for some practical and necessary purpose, without any intent to avoid or interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 2. That it shall be unlawful for any person or persons engaged in the transportation of property as aforesaid directly or indirectly to allow any rebate, drawback, or other advantage, in any form, upon shipments made or services rendered as aforesaid by him or them.

SEC. 3. That it shall be unlawful for any person or persons engaged in the carriage, receiving, storage, or handling of property as mentioned in the first section of this act to enter into any combination, contract, or agreement, by changes of schedule, carriage in different cars, or by any other means, with intent to prevent the carriage of such property from being continuous from the place of shipment to the place of destination, whether carried on one or several railroads. And it shall be unlawful for any person or persons carrying property as aforesaid to enter into any contract, agreement, or combination for the pooling of freights, or to pool the freights, of different and competing railroads, by dividing between them the aggregate or net proceeds of the earnings of such railroads, or any portion of them.

SEC. 4. That it shall be unlawful for any person or persons engaged in the transportation of property as provided in the first section of this act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or handling the same, for a shorter than for a longer distance on any one railroad; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation.

SEC. 5. That all persons engaged in carrying property as provided in the first section of this act shall adopt and keep posted up schedules which shall plainly state:

First. The different kinds and classes of property to be carried.

Second. The different places between which such property shall be carried.

Third The rates of freight and prices of carriage between such places, and for all services connected with the receiving, delivery, loading, unloading, storing, or handling the same. And the accounts for such service shall show what part of the charges are for transportation, and what part are for loading, unloading, and other terminal facilities.

Such schedules may be changed from time to time as hereinafter provided. Copies of such schedules shall be printed in plain, large type, at least the size of ordinary pica, and shall be kept plainly posted for public inspec-

tion in at least two places in every depot where freights are received or delivered; and no such schedule shall be charged in any particular except by the substitution of another schedule containing the specifications above required, which substitute schedule shall plainly state the time when it shall go into effect, and copies of which, printed as aforesaid, shall be posted as above provided at least five days before the same shall go into effect; and the same shall remain in force until another schedule shall as aforesaid be substituted. And it shall be unlawful for any person or persons engaged in carrying property on railroads as aforesaid, after thirty days after the passage of this act, to charge or receive more or less compensation for the carriage, receiving, delivery, loading, unloading, handling, or storing of any of the property contemplated by the first section of this act than shall be specified in such schedule as may at the time be in force.

SEC. 6. That each and all of the provisions of this act shall apply to all property, and the receiving, delivery, loading, unloading, handling, storing, or carriage of the same, on one actually or substantially continuous carriage, or as part of such continuous carriage, as provided for in the first section of this act, and the compensation therefor, whether such property be carried wholly on one railroad or partly on several railroads, and whether such services are performed or compensation paid or received by or to one person alone or in connection with another or other persons.

SEC. 7. That each and every act, matter, or thing in this act declared to be unlawful is hereby prohibited; and in case any person or persons as defined in this act, engaged as aforesaid, *shall do*, suffer, or permit to be done any act, matter, or thing in this act prohibited or forbidden, *or shall omit to do* any act, matter, or thing in this act required to be done, or shall be guilty of any violation of the provisions of this act, such person or persons shall forfeit and pay to the person or persons who may sustain damage thereby a sum equal to three times the amount of the damages so sustained, to be recovered by the person or persons so damaged, by suit in any State or United States court of competent jurisdiction where the person or persons causing such damage

can be found or may have an agent, office, or place of business; and if the court before which any such action is tried shall be of opinion that the violation of the law was willful, it shall make an allowance, by way of additional costs, to the party injured sufficient to cover all his counsel and attorney fees. Any action to be brought as aforesaid may be considered, and if so brought shall be regarded, as a subject of equity jurisdiction and discovery, and affirmative relief may be sought and obtained therein. In any such action so brought as a case of equitable cognizance as aforesaid, any director, officer, receiver, or trustee of any corporation or company aforesaid, or any receiver, trustee, or person aforesaid, or any agent of any such corporation or company, receiver, trustee, or person aforesaid, or of any of them, alone or with any other person or persons, party or parties, may and shall be compelled to attend, appear, and testify and give evidence; and no claim that any such testimony or evidence might or might not tend to criminate the person testifying or giving evidence shall be of any avail, but such evidence or testimony shall not be used as against such person on the trial of any indictment against him. The attendance and appearance of any of the persons who as aforesaid may be compelled to appear or testify, and the giving of the testimony or evidence, by the same, respectively, and the production of books and papers thereby, may and shall be compelled the same as in the case of any other witness; and in case any deposition or evidence, or the production of any books or paper, may be desired or required for the purpose of applying for or sustaining any such action, the same, and the production of books and papers, may and shall be had, taken, and compelled by or before any United States commissioner, or in any manner provided or to be provided for as to the taking of other depositions or evidence, or the attendance of witnesses, or the production of other books or papers in or by chapter seventeen of title thirteen of the Revised Statutes of the United States. No action aforesaid shall be sustained unless brought within one year after the cause of action shall accrue, or within one year after the party complaining shall have come to a knowledge of his right of action. And as many causes of action as may accrue

within the year may be joined in the same suit or complaint.

SEC. 8. That any director or officer of any corporation or company acting or engaged as aforesaid, or any receiver or trustee, lessee, or person acting or engaged as aforesaid, or any agent of any such corporation or company, receiver, trustee, or person aforesaid, or of one of them, alone or with any other corporation, company, person, or party, who *shall willfully do*, or cause or willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or forbidden, or who shall aid or abet therein *or shall willfully omit or fail to* do any act, matter, or thing in this act required to be done, or cause or willingly suffer or permit any act, matter, or things so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or aid or abet therein, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars.

SEC. 9. That nothing in this act shall apply to the carriage, receiving, storage, handling, or forwarding of property wholly within one State, and not shipped from or destined to some foreign country or other State or Territory; nor shall it apply to property carried for the United States at lower rates of freight and charges than for the general public, or to the transportation of articles free or at reduced rates of freight for charitable purposes, or to or from public fairs and expositions for exhibition.

SEC. 10. That the words "person or persons" as used in this act, except where otherwise provided, shall be construed and held to mean person or persons, officer or officers, corporation or corporations, company or companies, receiver or receivers, trustee or trustees, lessee or lessees, agent or agents, or other person or persons acting or engaged in any of the matters and things mentioned in this act.

See bill as printed by order of the House.

* * * * * *

On the 18th day of January, 1886, Shelby M. Cullom, a Senator from Illinois, from the Select Committee

on Inter-State Commerce, submitted a report (No. 46), accompanied by the following bill. The bill was read a first and second time and recommitted to the Select Committee on Inter-State Commerce.

Cong. Record, Vol. 17, p. 698.

This bill, S. 1093, was in the following words:

S. 1093.

A BILL

To Regulate Commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers who may be, separately or jointly, engaged in the transportation of passengers or property from one State or Territory of the United States to any other State or Territory of the United States, or from any place in the United States to any adjacent foreign country, or from any place in the United States through any foreign country to any other place in the United States, or who may be, separately or jointly, engaged in the transportation of property shipped from any place in any State or Territory of the United States to a foreign country, and carried from such place to a port of transshipment, or of property shipped from a foreign country to any place in any State or Territory of the United States and carried to such place from a port of entry.

And the provisions of this act shall likewise apply to any person, corporation, company, combination, firm, or association, whether incorporated or not, who or which may be separately or jointly engaged in the transportation of passengers or property as aforesaid upon any railroad or railroads, including all bridges, boats, and ferries used and operated in connection therewith, or any vessel or vessels, or partly by railroad and partly by vessel, or by any fast freight line, or by any other instrumentality of shipment or carriage.

And all charges made for any service rendered or to be rendered in the transportation of passengers or property

as aforesaid, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just.

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby declared to be a misdemeanor; and any common carrier found guilty of an unjust discrimination as aforesaid shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the common carrier guilty of the said offense shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation. If said common carrier be a corporation, then the principal officer of such corporation, its traffic manager, by whatever name called, or the officer or agent who made such rate shall, upon conviction of the willful violation of this section in any district court of the United States within the district where such offense was committed, be punishable as and for a misdemeanor, and be subject to a fine of not more than one thousand dollars for each offense.

SEC. 3. That every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable and proper facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith. No such common carrier shall make or give any undue or unreasonable preference or advantage to any particular person, company,

firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, nor shall any such common carrier subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Any common carrier found guilty of a willful violation of the provisions of this section, by any district court of the United States in the jurisdiction within which such offense was committed, shall be liable for damages at law for the injury inflicted, and shall be guilty as and for a misdemeanor, and shall be subject to a fine of not more than one thousand dollars for each offense; and if such common carrier be a corporation, the principal officer thereof, its traffic manager, by whatever name called, or the agent or person who is guilty of a willful violation of this section shall in like manner, in addition thereto, be personally punishable as and for a misdemeanor, and shall be subject to a fine of not more than one thousand dollars for each offense.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or property for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure, if such greater charge for the shorter distance constitute an unjust discrimination; but such greater charge for a shorter distance shall be presumptive evidence of unjust discrimination, which may, however, be rebutted by the common carrier.

Upon application to the Commission appointed under the provisions of this act, such common carrier may in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time make general rules covering exceptions to any such common carrier in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier from the operation of this section of this act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had bean specified in this section.

Any common carrier who shall violate this section of

this act shall be liable at law for all damages occasioned by such violation; and any excessive chargeth us made shall be deemed an act of extortion, and shall be refunded to the person, party, or corporation against whom such charge was made; and such common carrier shall, upon conviction thereof in any district court of the United States within the district where such offense was committed, be deemed guilty of a misdemeanor, and be subject to a fine of not more than five hundred dollars for each offense; and if such common carrier be a corporation, the principal officer thereof, its traffic manager, by whatever name called, or the agent or person who made such excessive charge shall be liable as and for a misdemeanor, and, upon conviction of the willful violation of this section by any district court of the United States within whose district such offense was committed, shall be subject to a fine of not more than five hundred dollars.

No criminal complaint shall be entertained by a court under the punitory provisions of this section unless the violation thereof shall have been certified to the district attorney by the Commission appointed under the provisions of this act.

SEC. 5. That every common carrier subject to the provisions of this act shall, within ninety days after this act shall take effect, file with the Commission appointed under the provisions of this act, copies of all their tariffs of rates, as well as all classifications, conditions, and terminal charges which in anywise change, affect, or determine any part of the aggregate of such tariff of charges or rates, and from time to time all changes in the same; and no preference whatever shall be given in the supply of cars, or the movement of the same, which are devoted to carriage thereunder; and said Commission shall from time to time prescribe the measure of publicity which said rates, charges, tariffs, and classifications shall receive, and the manner and the extent and localities to which they shall apply and in which they shall be published; and any common carrier subject to the provisions of this act who shall fail to file with said Commission its rates, charges, tariffs, and classifications, in conformity with the provisions of this section, or shall fail to publish

such rates, charges, tariffs, and classifications as required from time by said Commission, or shall fail to comply therewith when thus filed and published, shall, until such compliance, be excepted from the operation of any exemptions from the provisions of section four of this act.

No advance in such charges, rates, or classifications relating to transportation or terminal services, shall be made without ten days' public notice, but reduction in the same may be made without notice if made in good faith to meet competition; and such reduction shall be made public and be published in the manner to be provided by said Commission.

And whenever any common carrier subject to the provisions of this act shall have made and published its charges, rates, and classifications, either voluntarily or under the direction of the Commission, no advances or reductions shall thereafter be made in the same, or any of them, which do not simultaneously apply to all forwarders and receivers of like and analogous classes and kinds of traffic between the same points and for the same period.

Any violation of the provisions of this section of this act, and any failure on the part of any common carrier to comply with the provisions of this section, shall subject such common carrier to a writ of mandamus, to be issued by any circuit court of the United States within the jurisdiction where the principal office of said common carrier is situated, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and until compliance at the instance of said Commissioners, the said Commissioners, as complainants, may apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United

States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the provisions of this section of this act; and for any willful violation or failure to comply with the provisions of this section of this act the courts may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, to the Commissioners aforesaid, as may be just.

Any common carrier who shall fail to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within whose jurisdiction such offense was committed, be punishable by a fine of not more than one thousand dollars for each offense; and if such common carrier be a corporation, its principal officer, traffic manager, by whatever name called, or the agent or person who shall willfully violate any of the provisions of this section shall likewise be liable as and for a misdemeanor, and, upon conviction thereof in any district court of the United States within whose jurisdiction such offense was committed, shall be punishable by a fine of not more than one thousand dollars for each offense.

SEC. 6. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five and six years, respectively, beginning with the first day of July, anno Domini eighteen hundred and eighty-six, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Vacancies occasioned by removal, resignation, or other cause shall be filled by the

President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation or employment.

SEC. 7. The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. And for the purposes of this act the Commission shall have power to require the attendance of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of books, papers, and documents under the provisions of this section.

SEC. 8. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for any other penalty for the particular

violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 9. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

SEC. 10. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties, complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to

cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law. But if said common carrier shall neglect or refuse, within the time specified, to desist from such violation of the law or to make reparation for the injury done, in compliance with the report and notice of the Commission as aforesaid, it shall be the duty of the Commission to forthwith certify the fact of such neglect or refusal and forward a copy of its report and such certificate to the district attorney of the United States for the judicial district in which such violation of law occurred, for redress and punishment as in this act provided.

SEC. 11. That it shall be the duty of any district attorney to whom said Commission may forward its report and certificate as provided in the next preceding section of this act, when it shall appear from such report that any injury or damage has been sustained by any party or parties by reason of such violation of law by such common carrier, to forthwith bring suit, on behalf and in the name of the person or persons injured, against such common carrier, for the recovery of damages for such injury as may have been sustained by the injured party; and if on the trial of said cause judgment shall be rendered against said common carrier, the court may allow a reasonable attorney's fee to the district attorney for prosecuting said cause, to be taxed as part of the costs; and in case of failure to recover, the United States shall pay the necessary costs of suit.

In any case where the court shall adjudge that the violation of law by any such common carrier has been willfully continued after notice by said Commission to desist therefrom, the court may award to any party injured such a gross sum, by way of costs, as will reim-

burse all his costs and expenses, to be paid by such common carrier.

And when it shall appear by such report and certificate of the Commission that any common carrier has neglected or refused to desist from the violation of the provisions of law cognizable by such Commission, in compliance with the notice of said Commission, it shall also be the duty of the district attorney to forthwith apply by petition, in the name of the United States, to the circuit court of the United States for such district, for a temporary injunction against such common carrier, and for an order on said common carrier to show cause why it should not be enjoined and restrained from the continuance of such alleged violation, and for such other and further relief as may be just in the premises. And when such petition and the report of the Commission and its certificate showing that said common carrier persists and continues to violate the law have been filed as aforesaid, it shall be the duty of such court thereupon to issue a temporary writ of injunction restraining said common carrier from doing any further act in violation of the provisions of this act or other law cognizable by said Commission, as set forth in the report of the Commission, until said cause can be fully heard. Such court may enforce obedience to any such injunction, order, or decree, whether temporary or on final hearing made perpetual, by fine, proceedings for contempt, and by any or all other means within its lawful jurisdiction sitting as a court of equity; and for the purpose of making any order or decree in the premises, final or otherwise, such court shall be always open.

If any district attorney shall fail to apply for such temporary injunction and order to show cause, any person interested to restrain such violation may, on application to the court, be allowed to appear and be heard by himself or counsel, and to apply for such injunction and order; and such court may, in its discretion, appoint other counsel to prosecute such proceedings. The circuit court of the United States shall have jurisdiction to try such causes, without regard to the citizenship of the parties thereto or the amount involved therein.

SEC. 12. That the Commission may conduct its proceedings in such manner as will best conduce to the

proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations.

SEC. 13. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. All of the expenses of the Commission, including all necessary travelling expenses incurred by the Commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the Commission and the Secretary of the Interior.

SEC. 14. That the principal office of the Commission shall be in the city of Washington, where its general

sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

SEC. 15. That the Commission is hereby authorized to require quarterly and annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment, with a complete description of the same; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the monthly earnings and receipts from each branch of business and from all sources; the monthly operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if, in the opinion of the Commission, it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 16. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary.

SEC. 17. That the said Commission shall inquire into that method of railroad management or combination known as pooling, and shall report to Congress what, if any, legislation is advisable and expedient upon that subject.

SEC. 18. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 19. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; and nothing in this act contained shall in any way abridge or alter the remedies now at law provided, but the provisions of this act are in addition to such remedies. But no person, association, or corporation shall at the same time prosecute any complaint before said Commission and pursue his or its remedy at law; and lodg-

ing a complaint before such Commission shall suspend, until the same is disposed of, the common-law remedy; and it is expressly provided that no pending litigation between railroad companies shall in any way be affected by this act, and no offense perpetrated before the appointment of said Commission shall be cognizable by them or become the subject-matter of complaint or investigation.

SEC. 20. That the sum of thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ended June thirtieth, anno Domini eighteen hundred and eighty-seven, and the intervening time anterior thereto.